Supreme Court, U.S.
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In The

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, was enacted to ensure that consumers receive accurate information from creditors in a precise, uniform manner that allows consumers to compare the cost and terms of credit from various lenders. The primary means of enforcing TILA is by civil actions for statutory and actual damages under 15 U.S.C. § 1640(a). The questions presented are:

1. Whether the Seventh Circuit erred and eviscerated the basic enforcement mechanism of TILA, by holding that a lender who failed to conspicuously segregate the required disclosures under 15 U.S.C. § 1638(a) from other extraneous information in violation of 15 U.S.C. § 1638(b)(1), is immune from statutory damages under 15 U.S.C. § 1640(a).

2. Whether the Seventh Circuit erred and eviscerated the basic enforcement mechanism of TILA, by holding that a lender who failed to disclose the terms "annual percentage rate" and "finance charge" more conspicuously than other terms in violation of 15 U.S.C. § 1632(a), is immune from statutory damages under 15 U.S.C. § 1640(a).

PARTIES TO THE PROCEEDINGS

This petition involves multiple appeals from the United States Court of Appeals for the Seventh Circuit. Pursuant to Supreme Court Rule 12.4, the following cases are being joined because they involve identical or substantially similar issues: *Brown, et al. v. Payday Check Advance, Inc., et al.*, No. 99-3110 (7th Cir.); *Mitchem v. Payday Check Advance, Inc., et al.*, No. 99-3353 (7th Cir.); *Laws v. Payday Loan Corp.*, No. 99-3625 (7th Cir.); *Shabas v. Lighthouse Financial Group of Illinois, Inc., et al.*, No. 99-4004 (7th Cir.); and *Smith v. Cash Store Mgmt., Inc., et al.*, No. 00-1570 (7th Cir.). The following is a list of all parties to the proceeding whose judgment is sought to be reviewed:

Sandra Brown, Plaintiff-Petitioner
Deborah Jackson, Plaintiff-Petitioner
Victoria Davis, Plaintiff-Petitioner
Marguerite Mitchem, Plaintiff-Petitioner
Denise Laws, Plaintiff-Petitioner
David Shabas, Plaintiff-Petitioner
Valerie D. Smith, Plaintiff-Petitioner

Payday Check Advance, Inc. d/b/a Payday Express, Defendant-Respondent
Payday Advance, LLC, d/b/a Payday Express, Defendant-Respondent
Payday Loan Corp., Defendant-Respondent
Lighthouse Financial Group of Illinois, Inc., Defendant-Respondent
Andrew J. May, Defendant-Respondent
The Cash Store Management, Inc., Defendant-Respondent
The Cash Store, Ltd., Defendant-Respondent
Harold L. Ahlberg, Defendant-Respondent
Trevor L. Ahlberg, Defendant-Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Sandra Brown, Deborah Jackson, Victoria Davis, Marguerite Mitchem, Denise Laws, David Shabas, and Valerie D. Smith, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The citations of the official and unofficial reports of the opinions and orders entered in these cases are as follows:

The Opinion of the United States Court of Appeals for the Seventh Circuit in *Brown, Mitchem* and *Laws* is reprinted as Appendix A. The official citation for this opinion is *Brown, et al. v. Payday Check Advance, Inc., et al.*, 202 F.3d 987 (7th Cir. 2000).

The February 2, 2000 Order of the United States Court of Appeals for the Seventh Circuit in *Shabas*, summarily affirming the district court, is reprinted as Appendix B. There is no official citation for this order.

The April 18, 2000 Order of the United States Court of Appeals for the Seventh Circuit in *Smith*, summarily affirming the district court, is reprinted as Appendix C. There is no official citation for this order.

The Opinion of the United States District Court for the Northern District of Illinois in *Brown* is reprinted as Appendix D. There is no official citation for this opinion.

The Opinion of the United States District Court for the Northern District of Illinois in *Mitchem* is reprinted as Appendix E. There is no official citation for this opinion.

The Opinion of the United States District Court for the Northern District of Illinois in *Laws* is reprinted as Appendix F. There is no official citation for this opinion.

The Opinion of the United States District Court for the Northern District of Illinois in *Shabas* is reprinted as Appendix G. There is no official citation for this opinion.

The Opinion of the United States District Court for the Northern District of Illinois in *Shabas*, denying the motion for reconsideration, is reprinted as Appendix H. There is no official citation for this opinion.

The June 1, 1999 Opinion of the United States District Court for the Northern District of Illinois in *Smith* is reprinted as Appendix I. There is no official citation for this opinion.

The October 27, 1999 Opinion of the United States Court of Appeals for the Seventh Circuit in *Smith*, affirming in part and reversing and remanding in part the district court, is reprinted as Appendix J. The official citation for this opinion is *Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325 (7th Cir. 1999).

The February 17, 2000 Opinion of the United States District Court for the Northern District of Illinois in *Smith* is reprinted as Appendix K. There is no official citation for this opinion.

The Order of the United States Court of Appeals for the Seventh Circuit in *Brown, Mitchem* and

Laws, denying the petition for rehearing *en banc*, is reprinted as Appendix L. There is no official citation for this order.

The Order of the United States Court of Appeals for the Seventh Circuit in *Shabas*, denying the petition for rehearing *en banc*, is reprinted as Appendix M. There is no official citation for this order.

JURISDICTION

This petition involves multiple appeals from the United States Court of Appeals for the Seventh Circuit. Three of the appeals, *Brown, et al. v. Payday Check Advance, Inc., et al., Mitchem v. Payday Check Advance, Inc., et al.*, and *Laws v. Payday Loan Corp.*, were consolidated by the Seventh Circuit. The Seventh Circuit entered final judgment in all three cases on February 2, 2000. The petitioners timely filed a petition for rehearing *en banc* on February 16, 2000, which was denied on March 7, 2000. This petition was filed within 90 days of that date. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

The fourth appeal, *Shabas v. Lighthouse Financial Group of Illinois, Inc., et al.*, involves the same issue as that addressed in the *Brown* opinion. The Seventh Circuit entered final judgment in *Shabas* on February 2, 2000, summarily affirming the district court under the authority of *Brown*. Petitioner Shabas filed a petition for rehearing *en banc* on February 16, 2000, which was denied on March 7, 2000. Under Supreme Court Rule 12.4, petitioner Shabas joins in this petition which was filed within 90

days of March 7, 2000. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

The fifth appeal, *Smith v. The Cash Store Management, Inc., et al.*, also involves the same issue as that addressed in the *Brown* opinion. The Seventh Circuit entered final judgment in *Smith* on April 18, 2000, summarily affirming the district court under the authority of *Brown*. Under Supreme Court Rule 12.4, petitioner Smith joins in this petition which was filed within 90 days of April 18, 2000. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

A consolidated petition for review by certiorari is authorized by Supreme Court Rule 12.4 because the cases present questions which are either identical or closely related.

STATUTORY PROVISIONS INVOLVED

The following statutes are set forth in Appendix N to this Petition: 15 U.S.C. § 1632(a), 15 U.S.C. § 1638(b)(1), and 15 U.S.C. § 1640(a).

STATEMENT OF THE CASE[1]

Petitioners filed these lawsuits against respondents in the Northern District of Illinois. They alleged that

[1] The statement of the case for all of the cases are similar. For the sake of simplicity and convenience, a general statement for *Brown* and *Laws* will be provided.

respondents' loan disclosure statements violated the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* The district courts had jurisdiction under 15 U.S.C. § 1640 and 28 U.S.C. § 1331.

A. Factual Background

Respondents, Payday Check Advance, Inc. and Payday Advance, LLC, both d/b/a Payday Express ("Payday Express), Payday Loan Corp. ("Payday Loan"), Lighthouse Financial Group of Illinois, Inc., and The Cash Store Management, Inc., operate a chain of establishments which specialize in making "payday loans" or "title loans." A "payday loan" is a short term, very high interest rate loan handled with a minimum of paperwork. When the loan is granted, the borrower provides a check for the full amount that he is obligated to pay. The check is post-dated for two weeks so that it can be submitted for payment after the borrower's next scheduled payday. At the end of the two week period, the customer has the option of repaying the full amount or continuing the loan for an additional two week period by paying the interest. If the loan is not repaid or renewed, the lender presents the check for payment; if the check is not paid, the lender threatens or attempts to enforce the bad check statutes against the borrower.

Petitioners, Sandra Brown, Deborah Jackson, Victoria Davis and Denise Laws, obtained a number of loans from Payday Express and Payday Loan. The petitioners' loans were typically two weeks in duration and carried annual percentage rates that in some instances exceeded *500%*. When petitioners obtained their loans, they provided

post-dated checks for the full amount of the loan and finance charge. All of the loans were documented on a standard printed form, which constitutes both the loan agreement and the TILA disclosure statement. Petitioners alleged, *inter alia*, that the disclosure statements provided by respondents did not comply with TILA and implementing Regulation Z[2], 12 C.F.R. part 226 because: (i) the terms "finance charge" and "annual percentage rate" in the federal disclosure box were not more conspicuous than any other disclosure in violation of § 1632(a)[3]; and (ii) the required disclosures under § 1638(a) were not "conspicuously segregated" from other extraneous information in violation of § 1638(b)(1). Petitioners sought the recovery of statutory damages under § 1640(a). No actual damages were alleged.

B. Proceedings Below

Payday Express and Payday Loan moved to dismiss the TILA claims under Fed.R.Civ.P. 12(b)(6) arguing, in part, that petitioners could not recover statutory damages under 15 U.S.C. § 1640(a) for violations of § 1632(a) and § 1638(b)(1). The district courts agreed and petitioners appealed to the United States Court of Appeals for the Seventh Circuit.

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[2] Pursuant to 15 U.S.C. § 1604(a), the Board of Governors of the Federal Reserve System (the "Board") is authorized to prescribe regulations to carry out the purposes of the Act. The Board issued Regulation Z to implement the Act. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 559-60 (1980).

[3] All statutory citations contained in this petition refer to 15 U.S.C., unless noted otherwise.

The Seventh Circuit concluded that the loan documents issued by Payday Express and Payday Loan violated TILA because they violated the "segregation" and "more conspicuous" requirements. The Seventh Circuit then addressed whether petitioners could recover statutory damages for violations of §§ 1632(a) and 1638(b)(1).

The Seventh Circuit began its analysis by noting that the reference to "this part" in the opening sentence of § 1640(a) referred to Part B of TILA, 15 U.S.C. §§ 1631-49. *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 990 (7th Cir. 2000). Accordingly, it concluded that "[s]tatutory damages therefore are available for violations of any requirement in these 19 sections [§§ 1631-49], 'except as otherwise provided in this section.' " *Id.* at 990. According to the Seventh Circuit, the exception in § 1640 was contained in the following provision:

> In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title . . .

On its face, the above provision states that violations of (1), (7), (8) and (10)-(14) of § 1638(a) are not governed by the general rule, and statutory damages are not available for these limited violations. Despite this narrow exception, the Seventh Circuit interpreted the phrase "in connection with the disclosures referred to in section 1638" to also mean that the "more conspicuous" requirement of § 1632(a) did not trigger statutory damages. *Id.* at 991. It

also concluded that because § 1638(b)(1) was not listed in the above provision, statutory damages were not available for failing to "conspicuously segregate" the required disclosures. Thus, it affirmed the dismissal of petitioners' TILA claims.

REASONS FOR GRANTING THE PETITION

I.

THIS CASE PRESENTS AN IMPORTANT BUT UNRESOLVED QUESTION OF LAW.

Supreme Court Rule 10(c) provides that a factor favoring certiorari is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The *Brown* decision involves questions of exceptional importance in that the Seventh Circuit has issued an opinion that is contrary to the text of TILA and frustrates its goal to achieve nationwide standard disclosures of credit terms through private actions seeking statutory damages, by holding that lenders are not subject to statutory damages for violations of important and basic disclosure requirements.

A. The Importance Of The Truth In Lending Act.

From 1945 through 1967, the amount of consumer credit increased from $5.6 billion to $92.5 billion, a rate of

growth more than 4½ times as great as that of the economy.[4] Despite the growing importance of credit, there was no federal legislation that governed the uniform disclosure of credit information. As a result, consumers were faced with a number of credit disclosure practices that made it difficult to compare the costs of credit.[5] On February 16, 1967, President Johnson noted the importance of consumer credit and delivered a message that emphasized the need for legislation governing credit disclosures.[6] In the message, he stated:

> Consumer credit has become an essential feature of the American way of life. It permits families with secure and growing incomes to plan ahead and to enjoy fully and promptly the ownership of automobiles and modern household appliances. It finances higher education for many who otherwise could not afford it. To families struck by serious illness or other financial setbacks, the opportunity to borrow eases the burden by spreading the payments over time. . . . In many instances today, consumers do not know the costs of credit. Charges are often

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[4] H.R. Rep. No. 1040, 90th Cong., 1st Sess., 10-11 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1966; S. Rep. No. 392, 90th Cong., 1st Sess., 3 (1967).

[5] H.R. Rep. No. 1040, supra, at 13, *reprinted in* 1968 U.S.C.C.A.N. at 1970; S. Rep. No. 392, supra, at 2-3.

[6] Message from the President of the United States transmitting recommendations for consumer protection in the fields of credit, investments, health, meat inspection, hazards in the home, electric power reliability, and natural gas pipeline safety, 90th Cong., first sess., H. Doc. No. 57, pp. 3-4 (February 16, 1967); *see also* H.R. Rep. No. 1040, supra, at 8-9, *reprinted in* 1968 U.S.C.C.A.N. at 1965.

> stated in confusing or misleading terms. They are complicated by "add-ons" and discounts and unfamiliar gimmicks. The consumer should not have to be an actuary or a mathematician to understand the rate of interest that is being charged. As a matter of fair play to the consumer, the cost of credit should be disclosed fully, simply and clearly.

Congress responded to the call in 1968 by enacting the United States' first consumer credit law – the Truth in Lending Act.[7] TILA requires all creditors to disclose credit information in a uniform manner so that the American consumer would have "the information he needs to compare the cost of credit and to make the best informed decision on the use of credit."[8] To this day, TILA still remains "one of the Nation's most important consumer protection laws" enacted by Congress.[9]

B. The Purpose Of The Truth In Lending Act.

The stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). As this Court noted, TILA "reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' "

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[7] S. Rep. No. 73, 96th Cong., 1st Sess. 17 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280.

[8] H.R. Rep. No. 1040, supra, at 13, *reprinted in* 1968 U.S.C.C.A.N. at 1970; S. Rep. No. 392, supra, at 2-3.

[9] S. Rep. No. 73, supra, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 280.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973). Since one of the major problems TILA sought to correct was the lack of uniformity in credit disclosure practices, it requires creditors to disclose all key information in a uniform manner.[10]

To effectuate its purposes, TILA and Regulation Z mandate the disclosure of, among other things, the finance charge, annual percentage rate ("APR"), and amount financed in every consumer credit transaction. 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18. To promote uniformity, TILA and Regulation Z regulate the timing, form and placement of the mandated disclosures by requiring the disclosures to be "made before the credit is extended" and "grouped together" and "conspicuously segregated" from other information. 15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1). The "conspicuously segregated" requirement is normally satisfied by the use of a "federal box" – a heavy border surrounding the federal disclosures that separates them from other extraneous information.[11] The federal box allows the consumer to look to one place in the document so that he can easily compare the costs of credit. For information deemed extremely important (*i.e.* APR and finance charge), TILA requires that they be disclosed "more conspicuously" than other required disclosures. 15 U.S.C. § 1632(a).

The legislative history of TILA indicates that "the enforcement of [TILA] would be accomplished largely

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[10] S. Rep. No. 73, supra, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 280.

[11] The use of the "federal box" is illustrated by the model forms accompanying Regulation Z. *See e.g.*, Appendix O.

through the institution of civil actions . . . " *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68, 72 (9th Cir. 1980); *see also, Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 (11th Cir. 1994); *Davis v. Werne*, 673 F.2d 866, 869 (5th Cir. 1982). However, Congress knew that actual damages for disclosure violations were likely to be non-existent or difficult to ascertain.[12] *See Watkins v. Simmons and Clark, Inc.*, 618 F.2d 398, 400, n.6 (quoting S. Rep. No. 93-278, supra, at 14); *Postow v. OBA Federal S. & L. Ass'n.*, 627 F.2d 1370, 1384 (D.C. Cir. 1980). Therefore, § 1640(a) provides for the recovery of statutory damages as a basic enforcement and deterrent mechanism. *Riggs*, 623 F.2d at 71.

C. Importance Of The *Brown* Decision.

Recognizing the importance of uniformly disclosing the mandated disclosures, courts have required lenders to pay statutory damages under TILA's civil remedies provision (15 U.S.C. § 1640) if they failed to comply with §§ 1632(a) and 1638(b)(1). *See e.g., Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749, 751-52 (9th Cir. 1982) (Kennedy, J.); *Herrera v. First Northern S. & L. Ass'n.* 805 F.2d 896, 901 (10th Cir. 1986); *Pendleton v. American Title Brokers, Inc.*, 754 F. Supp. 860, 863-64 (S.D.Ala. 1991); *In re Cook*, 76 B.R. 661, 663-64 (Bankr. C.D.Ill. 1987). However, in *Brown*, the Seventh Circuit reached the exact opposite conclusion and held that statutory damages were not triggered for these violations.

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[12] *See* S. Rep. No. 93-278, 93rd Cong., 1st Sess., 14 (1973).

The *Brown* decision eviscerates TILA and invites blatant evasion of the disclosure requirements. If it is allowed to stand, it will frustrate TILA's goal to achieve nationwide standard disclosures of credit terms through private actions seeking statutory damages, by holding that lenders are not subject to statutory damages even if: (i) the disclosure is not made clearly and conspicuously; (ii) the disclosure is not segregated from other non-required information; (iii) the disclosure is made in microscopic type; or (iv) the disclosures are made *after* the transaction is completed. This is because these are violations of § 1632(a), § 1638(b)(1) and 12 C.F.R. § 226.17[13] – which, under *Brown*, do not provide for the recovery of statutory damages under § 1640(a).

The practical effect of *Brown* can be seen in *Shabas v. Lighthouse Financial Group of Illinois, Inc.*, one of the cases decided by the Seventh Circuit under *Brown*. In *Shabas*, the lender provided the following TILA disclosure:

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[13] In *Mourning*, this Court held that a violation of Regulation Z subjects lenders to statutory damages. 411 U.S. at 376.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate.	MONTHLY PERCENTAGE RATE The cost of your credit as a monthly rate.	FINANCE CHARGE The dollar amount the credit will cost you.	AMOUNT FINANCED The amount of credit provided to you on your behalf.	TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled.
% *216**	% *18*	$ *7,218.72*	$ *5013.00*	$ *12,231.72*

*Italic figures were handwritten originally.

As can be seen, the *Shabas* lender segregated the APR and finance charge from the other non-required terms by placing them inside of the federal box. However, the lender also placed the "monthly percentage rate," an item that is *not* required to be disclosed by TILA, inside of the federal box and made that disclosure equally prominent with the APR and finance charge. Since TILA and Regulation Z require the APR and finance charge to be "more conspicuous than any other disclosure," the lender's form document violated TILA as a matter of law. 15 U.S.C. § 1632(a); 12 C.F.R. § 226.17(a)(2). However, the district court dismissed the complaint because it concluded that statutory damages were not available for violations of § 1632(a). After Shabas appealed, the Seventh Circuit summarily affirmed the district court based on its opinion in *Brown*.

Shabas demonstrates the negative impact *Brown* will have on consumers. Under TILA, the finance charge is to be expressed as the "annual percentage rate" not the "monthly percentage rate." 15 U.S.C. § 1638(a)(4). TILA does not require lenders to disclose the "monthly percentage rate." However, if a lender chooses to do so, it cannot be placed inside of the federal box. 15 U.S.C. § 1638(b)(1). The *Shabas* lender inserted this information in an effort to divert the borrower's attention from the shocking 216% APR to the less intimidating 18% monthly percentage rate.

Moreover, tolerance of such a disclosure will allow lenders to purposely inundate borrowers with an overload of information, such as the "bi-weekly percentage rate" or "weekly percentage rate" or "daily percentage rate" and boilerplate contract provisions not pertinent to

TILA disclosures, in the federal box to divert attention from more important credit terms. As stated by this Court, "[m]eaningful disclosure does not mean more disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload].' " *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980). Accordingly, TILA does not "permit lenders to add meaningless information to disclosure statements, for to do so would encourage borrowers to ignore or to avoid reading these statements, and would thereby frustrate the purpose of the statute." *Wright v. Tower Loan of Miss., Inc.*, 679 F.2d 436, 445 (5th Cir. 1982).

If *Brown* is upheld, a lender could also disclose the APR and finance charge anywhere it wants – even if it is in microscopic type or hidden in a paragraph that is unlikely to be noticed. The lender could also disclose the credit terms *after* the transaction has been consummated. However, under *Brown*, none of the above violations trigger statutory damages because they are violations of § 1632(a), § 1638(b)(1) and 12 C.F.R. § 226.17 – which, under *Brown*, are supposedly not covered under § 1640(a). This result is absurd because it subjects a creditor to civil liability for failing to disclose a specific term, but protects the creditor from civil liability if that same disclosure is made obscurely or *after* the transaction.

Payday lenders in the Seventh Circuit can now argue that the following "disclosure" of the APR and finance charge is adequate and does not lead to statutory damages under *Brown*:

> You may prepay this contract in full at any time. In accordance with Truth in Lending Act (15 U.S.C. Section 1615) and Illinois Consumer Installment Loan Act (205 ILCS 670/15), if you pay off this loan early you shall be entitled to a refund of the unearned portion of the Finance Charge, unless that refund would be less than $1.00. The annual percentage rate on this loan is 521.43% and the finance charge is $30.00. The refund will be calculated in accordance with the method required by the Truth in Lending Act (15 U.S.C. Section 1615) and by the Illinois Consumer Installment Loan Act (205 ILCS 670/15). Upon determination of the amount owed based on your prepayment of the loan, we will return your check, which was used as security for this loan, and request payment from you of the amount due as revised in accordance with your prepayment.[14]

The purpose of TILA is to "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). The above "disclosure" makes a complete mockery of TILA by making a passing reference to the APR and finance charge in small font and in boilerplate language. This is not "meaningful disclosure" and does not present the information in a "clean format" for the consumer to easily compare credit terms. *See Rodash*, 16 F.3d at 1148 ("[F]inancial institutions may not bury any

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[14] This is not a hypothetical argument. Some payday lenders in the Seventh Circuit have made the exact same argument except in the context of disclosing a security interest under 15 U.S.C. § 1638(a)(9).

costs of credit as such indirection would hinder consumers in comparing credit terms and making the best informed decision on the use of credit."). However, under *Brown*, nothing can be done to deter this type of disclosure.

Taken to its logical conclusion, *Brown* stands for the proposition that as long as the creditor makes some disclosure – even an inaccurate one – statutory damages are not available. However, an inaccurate disclosure is essentially a failure to disclose. Thus, this Court and others have held that all TILA disclosures must be accurate. *See e.g., Beach v. Ocwen Federal Bank*, 523 U.S. 410, 412 (1998); *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 285 (7th Cir. 1997); *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 753 (7th Cir. 2000). This is consistent with the intent of Congress, which stated that disclosure of important credit terms is so important for credit comparison that "a creditor who gives inaccurate information should face a definite penalty." S. Rep. No. 73, 96th Cong., 1st Sess. 17 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 295. However, the *Brown* decision guarantees that lenders who make inaccurate disclosures will not face a penalty.

In holding that statutory damages are not available for violations of §§ 1632(a) and 1638(b)(1), the *Brown* decision conflicts with a long series of cases from this Court and other circuits that recognize that disclosures under TILA must be in a precise, uniform manner and that compliance with these requirements is enforced by statutory damages. *See e.g., Beach*, 523 U.S. at 412; *Dixey*, 677 F.2d at 751-52; *Herrera*, 805 F.2d at 901; *Davis*, 673 F.2d at 869. Indeed, TILA's legislative history demonstrates that "[t]he purpose of the civil penalties section under

Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy." S. Rep. No. 93-278, supra, at 14. Congress thoroughly evaluated its options for enforcement before creating a "system of private attorneys general who could effectively enforce the Act without government intervention." *James v. Home Contsr. Co. of Mobile, Inc.*, 689 F.2d 1357, 1359 (11th Cir. 1982); *see also Bizier v. Globe Financial Servs., Inc.*, 654 F.2d 1, 3-4 (1st Cir. 1981); *Sosa v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974). Thus, TILA provides for the recovery of statutory damages to "encourage lawsuits by individual consumers as a means of enforcing creditor compliance with the Act." *Watkins*, 618 F.2d 398, 399 (6th Cir. 1980). This not only benefits the individuals who sue, but also the general public who rely largely on the efforts of individual consumers to enforce TILA. *Parker v. De Kalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982). *Brown* frustrates this congressional intent by providing that consumers cannot recover statutory damages for violations of §§ 1632(a) and 1638(b)(1) – requirements that go to the very heart of uniform disclosure. As a result, consumers are discouraged from bringing lawsuits to enforce creditor compliance and the call for public enforcement will be left unanswered. The general public must now rely solely on the Federal Trade Commission to enforce the uniform disclosure requirements. However, even Congress recognized that the Federal Trade Commission had inadequate enforcement resources. *Watkins*, 618 F.2d at 400.

It has been over thirty years since the passage of TILA. However, TILA's goal of establishing uniform disclosure requirements is as important today as it was in

1968. Unfortunately, *Brown* undermines this purpose by holding that consumers cannot recover statutory damages for violations of § 1632(a) and § 1638(b)(1). Since actual damages for disclosure violations are likely to be nonexistent or difficult to ascertain, TILA's primary enforcement and deterrent mechanism has been rendered useless by the *Brown* decision. *Postow*, 627 F.2d at 1384; *Riggs*, 623 F.2d at 71. As a result, lenders will no longer be deterred from failing to comply with the uniform disclosure requirements, and the purposes of TILA will be eviscerated. Lenders will be allowed to inundate consumers with a flood of information rendering the credit terms meaningless or confusing. More importantly, essential credit terms will no longer be uniformly disclosed so that consumers can readily compare credit terms and make informed decisions.

Under Supreme Court Rule 10(c), this Court can consider unresolved questions that are extremely important. As shown above, TILA remains one the most important consumer protection laws enacted by Congress. Due to the importance of the question presented and its profound effect on everyday life, petitioners respectfully submit that this Court should review this matter.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

A. The *Brown* Decision Conflicts With The Plain Text Of TILA.

The introductory clause of § 1640(a) makes it clear that the general rule is that statutory damages are recoverable for *any* violation of §§ 1631-49 (Part B), unless noted otherwise. Section 1632(a) – which contains the "more conspicuous" requirement – is included in Part B of TILA. Only *certain* violations of §§ 1637 and 1638 do not qualify for statutory damages.[15] Section 1638 does not contain any requirement that the APR and finance charge be disclosed more conspicuously. Accordingly, any violation of § 1632(a) triggers statutory damages because there is no exception in § 1640(a) limiting recovery for violations of § 1632(a). *See Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 276 (D.Del. 1999).[16]

The Seventh Circuit rejected this simple and reasonable interpretation of § 1640(a). Instead, it gave a very broad interpretation of the damages limitation provision found near the end of § 1640(a) and concluded that statutory damages were not available for violations of

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[15] Since these cases do not involve open credit plans, § 1637 does not apply.

[16] In an extremely well reasoned opinion, the court in *Johnson* conducted a thorough analysis of TILA's text and legislative history and concluded that statutory damages were available for violations of § 1632(a).

§ 1632(a) because it works "in connection with the disclosures referred to in section 1638." *Brown*, 202 F.3d at 991.

Presumably, the Seventh Circuit interpreted the phrase "in connection with the disclosures referred to in section 1638" to mean that it also applied to *how* the § 1638(a) items were to be disclosed because the form of disclosure is "connected" with the § 1638(a) disclosures. However, the Seventh Circuit misinterpreted § 1640(a). The "in connection with the disclosures" language is merely a transition statement that alerts the reader that the following sentence applies to items under § 1638(a)(1)-(14). The transition statement is necessary because the prior sentence dealt with the disclosures required under § 1637.

Petitioners' interpretation of § 1640(a) is simple, reasonable and reinforced by case law. Courts have repeatedly awarded statutory damages or upheld claims for violations of the "more conspicuous" requirement. *See Dixey*, 677 F.2d at 751-52 (court held that plaintiff entitled to statutory damages for violation of the "more conspicuous" requirement); *Herrera*, 805 F.2d at 901 (same). Indeed, in *Beach v. Ocwen Federal Bank*, this Court specifically noted that TILA provides for statutory damages for disclosure violations – including 15 U.S.C. § 1632:

> [T]he Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights. *See* §§ 1631, **1632**, 1635, 1638. Failure to satisfy the Act subjects a lender to . . . statutory and actual damages traceable to

> a lender's failure to make the requisite disclosures, see § 1640.

523 U.S. at 412 (emphasis added).

Additionally, the Seventh Circuit incorrectly decided that violations of § 1638(b)(1) did not trigger statutory damages. Although the damages limitation provision does not list violations of § 1638(b)(1) to which liability will attach, it is clear that the list is simply a list of credit terms under § 1638(a) that must be disclosed to avoid liability. The list distinguishes which terms may give rise to statutory damages and which terms do not. However, it does not concern the timeliness and segregation requirements of § 1638(b)(1). This is evidenced by the wording of § 1640(a) and § 1638(b)(1). The damages limitation provision in § 1640(a) states that "[i]n connection with the *disclosures* referred to in section 1638 . . . " statutory damages are available for certain violations. (emphasis added). Similarly, § 1638(b)(1) also repeatedly refers to the "*disclosures* required under [1638(a)] . . . " (emphasis added). It would make no sense for § 1638(b)(1) to refer to the "disclosures" of § 1638(a) if it itself was also the "disclosures." Clearly Congress thought that there was a difference between the "disclosures" of § 1638(a) and the form and timing of those "disclosures" as set forth in § 1638(b)(1).

The Seventh Circuit erroneously focused solely on the damages limitation provision of § 1640(a) in concluding that statutory damages were not available for violations of § 1632(a) and § 1638(b)(1). In doing so, it rendered §§ 1632(a) and 1638(b)(1) superfluous. This violates a basic rule of statutory construction – that in

expounding a statute, the court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. Nat. Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993). Thus, a court has a duty to "give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109-110 (1990).

The *Brown* decision is not supported by the text of § 1640(a) or by case law. Section 1640(a) clearly provides that statutory damages are available for any violation under Part B, unless noted otherwise. Section 1632(a) is included in Part B, and there is nothing in § 1640(a) that limits the recovery of statutory damages for violations of § 1632(a). Furthermore, the damages limitation provision only applies to § 1638(a) – not § 1638(b)(1).

B. The *Brown* Decision Conflicts With TILA's Legislative History.

In 1980, TILA was amended to limit recovery of statutory damages under § 1640. The amendments were included to "restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping." S. Rep. No. 73, 96th Cong., 1st Sess. 17 (1979), *reprinted in* 1980 U.S.C.C.A.N. 280, 294. Congress believed this would "eliminate litigation based on purely technical violations of the [A]ct." *Id.*

The legislative history of the 1980 amendments clearly shows that Congress did not think violations of the uniform disclosure requirements, including § 1632(a)

and § 1638(b)(1), were "technical."[17] In fact, Congress thought the uniform disclosure requirements were very important:

> In order to assure that disclosures are presented in a clean format, the section requires that no other data be intermingled with this information. The committee believes this is an *important* facet of simplification in that truth in lending information will be highlighted by being set off from other data. (Emphasis added).

Id. Indeed, the very purpose of the amendments were to "provide the consumer with clearer credit information" and to "provid[e] the consumer with simpler, more understandable information . . . " *Id.* at 280, 281.

Congress' actions also show that it did not think violations of the uniform disclosure requirements were "technical." On the contrary, Congress thought they were so important that the 1980 amendment *added* § 1632(a) which requires the APR and finance charge to be disclosed "more conspicuously." Prior to its inclusion into the act, the "more conspicuous" requirement was found only in Regulation Z. Congress expressly included the "more conspicuous" disclosure requirement to TILA itself, and did so *outside* of § 1638, whose damage provisions it had just limited. Congress' actions indicate that it did not consider violations of the "more conspicuous" requirement to be a mere technical violation, and that statutory damages are available in such cases.

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[17] In *Ford Motor Credit v. Milhollin*, 444 U.S. 555 (1980), this Court relied extensively on the legislative history of TILA.

III.

THERE IS A CONFLICT AMONG THE FEDERAL CIRCUIT COURTS.

Supreme Court Rule 10(a) provides that a factor favoring certiorari is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." *See also, Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The Seventh and Tenth Circuits have reached opposite conclusions on one of the issues presented in this case – whether TILA provides for the recovery of statutory damages where a lender fails to disclose the terms "annual percentage rate" and "finance charge" more conspicuously than other terms as required under § 1632(a).

In *Herrera*, 805 F.2d at 896, plaintiffs entered into a real estate loan agreement with defendant which was evidenced by a promissory note. The defendant provided the TILA disclosure statement, which disclosed among other things, the interest charged expressed as an "annual percentage rate." Plaintiffs filed suit under TILA alleging that the annual percentage rate was not disclosed "more conspicuously" than the other credit terms. The Tenth Circuit began its analysis by noting that the "annual percentage rate" was disclosed in the same size, style and boldness of other terms. *Id.* at 900. Accordingly, it held that defendant's disclosure of the "annual percentage rate" did not satisfy the "more conspicuous" requirement and affirmed the district court's award of $1000 to plaintiffs under § 1640(a). *Id.* at 900-901.

Brown is factually similar to *Herrera*. The *Brown* petitioners obtained payday loans from respondents. Petitioners alleged that some of the loan agreements contained the same types of violations as those found in *Herrera*. Specifically, that the TILA statements failed to disclose the terms "annual percentage rate" and "finance charge" "more conspicuously" than other terms in violation of § 1632(a). Like the Tenth Circuit, the Seventh Circuit held that respondents had violated § 1632(a). However, unlike the Tenth Circuit, the Seventh Circuit concluded that TILA did not provide for the recovery of statutory damages for these types of violations, and affirmed the dismissal of petitioners' TILA claims.

As can be seen, the Tenth and Seventh Circuits have reached the opposite conclusion on the same issue. In light of this split of authority and the resulting inconsistencies which will follow, petitioners respectfully submit that this Court should review this matter and render a decision to be followed in all Circuits.

CONCLUSION

For the reasons above, petitioners respectfully request that this Court grant their petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SANDRA BROWN, DEBORAH JACKSON, and VICTORIA DAVIS, *Plaintiffs-Appellants,* No. 99-3110 v. PAYDAY CHECK ADVANCE, INC., and PAYDAY CHECK ADVANCE, LLC, both doing business as Payday Express, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 C 2074 James B. Zagel, *Judge.*
MARGUERITE MITCHEM *Plaintiff-Appellant,* No. 99-3353 v. PAYDAY CHECK ADVANCE, INC., and PAYDAY CHECK ADVANCE, LLC, both doing business as Payday Express, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 C 1869 Matthew F. Kennelly, *Judge.*
DENISE LAWS, *Plaintiff-Appellant,* No. 99-3625 v. PAYDAY LOAN CORP. OF ILLINOIS, *Defendant-Appellee.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 5562 Joan B. Gottschall, *Judge.*

February 2, 2000, Decided

Before Bauer, Easterbrook, and Kanne, Circuit Judges.

Easterbrook, Circuit Judge. These related cases present questions concerning damages under the Truth in Lending Act. Three district judges concluded that the kind of violations asserted by the plaintiffs do not lead to the awards (called statutory damages) that are available under 15 U.S.C. sec.1640(a)(2) without regard to injury. Because plaintiffs declined to allege any actual injury, the cases were terminated on the pleadings. Two of the decisions are available at 1999 U.S. Dist. Lexis 16225 (N.D. Ill. Sept. 30, 1999) and 1999 U.S. Dist. Lexis 17423 (N.D. Ill. Aug. 3, 1999); the third is unpublished.

All three of these cases arise from transactions known as "payday loans" – short-term, high-interest, single-payment credit for which the lender requires a post-dated check that can be cashed after the borrower's next payday. *See Smith v. Cash Store Management, Inc.*, 195 F.3d 325 (7th Cir. 1999); *Smith v. Check-N-Go of Illinois, Inc.*, No. 99-2666 (7th Cir. Dec. 23, 1999). Two of the three challenge the lender's application of the phrase "total payment" to the borrower's obligation. According to plaintiffs, the Act requires lenders either to use the phrase "total of payments" to describe the sum of the amount financed and the finance charge, *see* 15 U.S.C. sec.1638(a)(5), or not to describe this sum at all, when the borrower will make just one payment. The district judges sensibly rejected this contention, because the Federal Reserve (which administers the TILA) permits a lender to dispense with the "total of payments" disclosure when there will be only one payment. 12 C.F.R. sec.226.18(h) n.44 (part of the Federal Reserve's Regulation Z). Omitting the phrase "total of payments" does not imply that

the lender must keep mum about how much the borrower needs to repay.

Although we agree with the district judges that the lenders may use the term "total payment," this does not mean that lenders may put it anywhere they please on their forms. All disclosures required by federal law must be grouped together and "conspicuously segregated" from other information. 15 U.S.C. sec.1638(b)(1). Given 12 C.F.R. sec.226.18(h) n.44, the "total payment" for a one-payment loan is not a disclosure required by federal law and therefore must be kept separate from information such as the finance charge and the annual percentage rate. Yet the lenders put the "total payment" in the "federal box" (the portion of the form devoted to the mandatory disclosures), just as if it were a "total of payments" item. Because the TILA receives a hypertechnical reading, *see Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407, 417 (7th Cir. 1980), the lenders' use of "total payment" rather than "total of payments" in the federal box yields a violation of the segregation rule. Some of the forms violate sec.1638(b)(1) in other ways, such as including an itemization in the federal box of the amount financed (itemizations are supposed to be outside the federal box) and providing space for the number of the check that the borrower provides (again this information should have been elsewhere).

Forms provided to the five plaintiffs depart from the statutory model in other ways. Some of them fail to provide adequate descriptive explanations of terms such as "finance charge" and "annual percentage rate"; this shortcoming violates 15 U.S.C. sec.1638(a)(8). At least one form, received by plaintiff Denise Laws, is deficient

because the phrases "finance charge" and "annual percentage rate" are in the same typeface as "amount financed" and "total of payments." Because the former terms must be "disclosed more conspicuously than" the latter, Payday Loan Corp. has violated 15 U.S.C. sec.1632(a). See also 12 C.F.R. sec.226.17(a)(2).

What remedies are available for violations of sec.1632(a), sec.1638(a)(8), and sec.1638(b)(1), the provisions transgressed by these defendants? Compensatory damages for any actual injury, surely. 15 U.S.C. sec.1640(a)(1). But plaintiffs forswear any claim of injury and seek only statutory damages under sec.1640(a)(2). We set out the portions of sec.1640(a) that bear on plaintiffs' contentions.

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –
>
> (1) any actual damage sustained by such person as a result of the failure; (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, . . . or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or (B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any

class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

. . .

. . . In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8),(9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610 (a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. . . . In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5),(6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title.

The reference to "this part" in the opening sentence of sec.1640(a) is to Part B of the TILA, 15 U.S.C. sec.sec. 1631-49. Statutory damages therefore are available for

violations of any requirement in these 19 sections, "[e]xcept as otherwise provided in this section". *Cf. Strange v. Monogram Credit Card Bank*, 129 F.3d 943 (7th Cir. 1997). The "otherwise" comes in the two long unnumbered sentences that begin "[i]n connection with the disclosures referred to in" either sec.1637 or sec.1638. Section 1637 deals with open-end consumer credit (such as revolving loans on a credit card). Payday loans come within sec.1638, which addresses all consumer loans other than open-end credit plans. It is sec.1638 that requires the disclosures to plaintiffs. The more-conspicuous-disclosure obligation of sec.1632(a) works "[i]n connection with the disclosures referred to in section 1638", so the final sentence we have reproduced in the block quotation reads on all of the claims made by all of our plaintiffs.

Statutory damages are available, this final sentence says, "only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the 'amount financed'), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for" other situations not presented by these cases. "Only," the word we have italicized, is conclusive against plaintiffs, for it confines statutory damages to a closed list. Failure to emphasize the typeface of "finance charge" and "annual percentage rate" violates sec.1632(a); omission of descriptive explanations violates sec.1638(a)(8); appearance of extra matter in the federal box violates sec.1638(b)(1). None of these subsections is on the list of violations eligible for statutory damages.

Plaintiffs insist that information has been "disclosed" in compliance with sec.1638 only if all of the TILA and all

of Regulation Z have been followed. On this understanding, although the lenders informed the borrowers of correctly calculated finance charges and annual percentage rates, and made all other mandatory disclosures, they did not comply with the sections requiring these disclosures, because they did not make the disclosures in the form required by other parts of the statute and regulations. The lenders may have informed borrowers of the statutory items, plaintiffs insist, but they did not "disclose" these items. Thus, according to plaintiffs, any violation of sec.1632(a), sec.1638(a)(8), or sec.1638(b)(1) also violates sec.1638 (a)(3) (which requires the lender to disclose the finance charge), sec.1638(a)(4) (which requires the lender to express the finance charge as an annual percentage rate), and so on. Because sec.1638(a)(3) and (a)(4) are on the list of violations eligible for statutory damages, plaintiffs say that they must prevail. Yet accepting this argument would destroy the point of sec.1640(a). What sense would it make to omit sec.1632, sec.1638(a)(1), (a)(2) (in part), (a)(7), (a)(8), (a)(10), (a)(11), (a)(12), and all of sec.1638(b), (c), and (d) from the candidates for statutory damages if they came in through the back door on the theory that all formal shortcomings infect the disclosures of the items that are on the list? Congress included some and excluded others; plaintiffs want us to turn this into universal inclusion, which would rewrite rather than interpret sec.1640(a).

The portion of sec.1640(a) that we have been considering was added to the TILA in 1980 to curtail damages awards for picky and inconsequential formal errors. Truth in Lending Simplification and Reform Act, Pub. L.

96-221, 94 Stat. 132, 168 (1980). It would hardly be appropriate to undo Congress' decision by reading matters of form into the substantive provisions for which statutory damages are authorized. Still, plaintiffs seek to take advantage of the enactment history by contending that the limiting language of sec.1640(a) does not apply to the more-conspicuous-disclosure requirement of sec.1632(a). Until 1980 that obligation was found only in Regulation Z. Therefore, plaintiffs insist, it could not have been among the technical violations that Congress sought to disqualify from statutory damages. One could respond that it is implausible to impute to Congress the creation of statutory damages for a formal rule added to the statute in 1980 when it was getting rid of statutory damages for other gaffes. Neither the thrust nor the parry has any pizzazz, however. Section 1640(a) says that statutory damages are available "only" for violations of enumerated subsections and rules. Section 1632(a) is not on that list. Whether Congress should have included it, or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted. *See West Virginia University Hospitals Inc. v. Casey*, 499 U.S. 83, 100-01 (1991); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989). Even if its omission is a legislative oversight, the fact remains that sec.1632(a) is not on the list. Because all of the formal details prescribed by sec.1632 are "in connection with" disclosures under sec.1638, omission from the list means no statutory damages.

Plaintiffs rely heavily on two appellate decisions awarding statutory damages for violations of the more-conspicuous requirement of sec.1632(a). The first of these, *Dixey v. Idaho First National Bank*, 677 F.2d 749 (9th Cir.

1982) (Kennedy, J.), deals with events before the effective date of the 1980 amendments, and the court remarked that the result might well be otherwise under the revised version. 677 F.2d at 753. *Herrera v. First Northern Savings & Loan Ass'n*, 805 F.2d 896 (10th Cir. 1986), deals with events covered by the 1980 amendments, and thus might in principle offer the plaintiffs some comfort, but the tenth circuit did not discuss the effect of sec.1640(a). Defendant in that case relied instead on sec.1640(c), which forecloses all liability (for compensatory or statutory damages) when the violation was "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." Because the tenth circuit did not discuss the portion of sec.1640(a) that we have considered, it does not hold anything one way or the other about it. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 & n.29 (1984); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 & n.9 (1952). As far as we can see, our cases are the first in the nation to present the subject to a court of appeals. We hold that sec.1640(a) means what it says, that "only" violations of the subsections specifically enumerated in that clause support statutory damages, and that the TILA does not support plaintiffs' theory of derivative violations under which errors in the form of disclosure must be treated as non-disclosure of the key statutory terms.

Affirmed

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

February 2, 2000

Before

Hon. William J. Bauer, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

David Shabas *Plaintiff-Appellant* No. 99-4004 v. Lighthouse Financial Group of Illinois, Inc., etal., *Defendants-Appellees.*	) Appeal from the) United States) District Court for) the Northern) District of Illinois,) Eastern Division.)) No. 99 C 4501) James F.) Holderman, *Judge*.

Order

The judgment is affirmed on the authority of *Smith v. Cash Store Management, Inc.*, 195 F.3d 325, 328-31 (7th Cir. 1999); *Hahn v. McKenzie Check Advance of Illinois, LLC*, No. 99-3346 (7th Cir. Feb. 2, 2000); and *Brown v. Payday Check Advance, Inc.*, No. 99-3110 (7th Cir. Feb. 2, 2000).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted April 10, 2000
Decided April 18, 2000

Before

Hon. William J. Bauer, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon Michael S. Kanne, Circuit Judge

Valerie D. Smith, *Plaintiff-Appellant* No. 00-1570 v. Cash Store Management, Incorporated, *et al.*, *Defendants-Appellees*	) Appeal from the) United States Dis-) trict Court for the) Northern District of) Illinois, Eastern) Division. No. 99 C 1726 Suzanne B. Conlon, *Judge*.

Order

The judgment is affirmed on the authority of *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BROWN v. PAYDAY CHECK ADVANCE

No. 99 C 2074

August 3, 1999, Decided
August 5, 1999, Date Docketed

OPINION: Judge James B. Zagel

Sandra Brown, Deborah Jackson, and Victoria Davis (collectively the "Plaintiffs") have filed a twice-amended, six-count complaint against Payday Check Advance, Inc. d/b/a Payday Express, Payday Check Advance, LLC d/b/a Payday Express, and John Does 1-10 (collectively "Payday") for violating the Truth in Lending Act, 15 U.S.C. § 1601 et seq. ("TILA") (Count I), implementing Federal Reserve Board Regulation Z, 12 C.F.R. § 226 ("Regulation Z"), and state law (Counts II-IV). The Plaintiffs claim no actual damages; they seek only statutory damages and attorneys' fees. Payday has moved to dismiss the Plaintiffs' complaint pursuant to Fed. R. Civ. P. ("Rule") 12(b)(6). Plaintiffs allege that Payday violated TILA because it (1) failed to conspicuously segregate finance information, (2) failed to include descriptive information about the amount financed, finance charge, annual percentage rate, and total payments, (3) used "total payment" instead of "total of payments," and (4) obtained postdated checks from borrowers without disclosing a security interest in the underlying accounts.

Payday first argues that the Plaintiffs are not entitled to statutory damages for the violations they allege and

that their failure to plead actual damages mandates dismissal of two of the four alleged TILA violations. Payday says that the statutory damages are governed exclusively by § 1640 of TILA. This section provides for statutory damages only in certain enumerated instances. See 15 U.S.C. § 1640(a)(4) (providing statutory damages under § 1638 only for ¶¶ 2 – with regard to disclosure of the "amount financed" – 3, 4, 5, 6, and 9.)

Payday says that conspicuous segregation and descriptive explanation allegations are not among the enumerated claims in § 1640. This is correct. Disclosure requirements for the amount financed, finance charge, annual percentage rate, and total of payments – delineated in § 1638(a) – are within the enumerated claims in § 1640, but conspicuous segregation and descriptive explanation requirements – contained in §§ 1638(b) and 1638(a)(8) respectively – are not. The Plaintiffs say that statutory damages are available under any provision of Regulation Z that merely implements these enumerated claims. Conspicuous segregation, Plaintiffs argue, is implemented by Regulation Z and is merely part of § 1638(a)'s amount financed disclosure requirement. Plaintiffs say that failure to include the conspicuousness requirement in the statutory damage category would destroy the effectiveness of the disclosure altogether.

Payday's alleged violation does not merit statutory damages under § 1640. In the context of Payday's contract, its inclusion of the check number in the same section as the § 1638(a) disclosures does not affect § 1638(a)'s effectiveness; the § 1638(a) disclosures in Payday's form are unmistakable and straightforward. More importantly,

the Plaintiffs may not recover statutory damages for violations of § 1638(b), which contains the conspicuous segregation requirement. See 16 U.S.C. 1640(a). *See also Groth v. Rohr-Ville Motors, Inc.*, 1997 WL 630189 (N.D. Ill. 1997) (holding that a failure to accurately itemize the components of the amount financed did not constitute a failure to disclose the amount financed and therefore did not entitle the plaintiff to statutory damages under § 1640(a)(1).)

Similarly, Payday's lack of descriptive violations does not entitle the Plaintiffs to statutory damages under § 1640(a)(1) because the descriptive violations' requirement is not specifically enumerated in that section. *See* 15 U.S.C. @ 1640(a)(4); *Groth*, 1997 WL 630189 at *3.

Next, Payday argues that the term "total payment" does not violate TILA's requirement that it use the term "total of payments" because Regulation Z does not require the use of that term when it does not apply. See 12 C.F.R. § 226.18(h) n. 44. The parties do not dispute that total of payments was not required here because Payday's contract mandated only one payment. The Plaintiffs argue that Payday did not merely omit this information but included it under a non-conforming term. If required, Payday's use of the term "total payment" would have violated TILA. However, it was not required, and the Plaintiffs point to no law holding that accurate disclosure of information not required by statute creates a cause of action for statutory damages under TILA. *See Groth*, 1997 WL 630189 at *3.

Finally, Payday argues that the last charge in the Plaintiffs' TILA count fails because a postdated check

does not create a security interest in the checking account. This is correct. Accepting a postdated check merely provides an interest in the check, which Payday has adequately disclosed. *See Smith v. Cash Store, 1999 WL* 412447 (N.D. Ill., June 1, 1999).

The Plaintiffs' TILA claim having failed, I decline to exercise jurisdiction over the remaining state law claims and dismiss the complaint in its entirety. *See* 28 U.S.C. 1367(b)(3).

Payday's Motion to Dismiss is granted in its entirety, terminating this case.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARGUERITE MITCHEM v.
PAYDAY CHECK ADVANCE

No. 99 C 1869

September 10, 1999, Decided
September 14, 1999 Date Docketed

JUDGE: Matthew F. Kennelly

ORDER

Plaintiff Marguerite Mitchem obtained a number of "payday loans" from defendant Payday Check Advance, Inc., which does business as "Payday Express." A payday loan is a short term loan made at a very high interest rate – in this case over 520 percent per annum. Mitchem, on behalf of a class of similarly situated persons, alleges that Payday violated the Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*, in connection with the making of the loans. Specifically, plaintiffs claim: (1) that Payday's forms omitted the required explanations of the terms "amount financed," "finance charge," and "annual percentage rate," *see* 15 U.S.C. § 1638(a)(8); 12 C.F.R.§ 226.18(b), (d), (e); (2) that Payday's forms failed to "conspicuously segregate" the required disclosures, 15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1); and (3) that Payday improperly used the term "total payment" rather than the prescribed term "total of payments." 15 U.S.C. § 1638(a)(5); 12 C.F.R. § 226.18(h). Plaintiffs do not claim any actual damages; rather, they seek only statutory damages under 15 U.S.C. § 1640(a)(2), as well as attorney's

fees. Plaintiffs also allege state law claims of unconscionability and violation of the Illinois Consumer Fraud Act.

While it seems clear that Payday's forms violated TILA's requirements with respect to the descriptive explanations of the terms and "conspicuous segregation," section 1640(a) provides that statutory damages are not available for such violations. *See* 15 U.S.C. § 1640(a) (providing for statutory damages in connection with disclosures required under § 1638 only for violations of § 1638(a)(2) (with regard to the disclosure of the "amount financed"), (3), (4), (5), (6), and (9)). Plaintiffs' first two claims arise from violations of § 1638(a)(8), the provision requiring the descriptive explanations, and § 1638(b), which mandates segregation of the required terms. Under § 1640(a), such violations do not give rise to statutory damages. Plaintiffs argue that their claims also arise under TILA's governing regulation, Regulation Z, and thus are not covered by § 1640(a)'s limitation, but to accept this argument would require the Court to circumvent the statute's plain language. Because plaintiffs do not seek actual damages for these violations, their claims cannot stand. *See, e.g., Groth v. Rohr-Ville Motors, Inc.*, No. 95 C 5429, 1997 WL 630189 (N.D. Ill. Sept. 30, 1997) (Williams, J.); *Brown v. Payday Check Advance, Inc.*, No. 99 C 2074 (N.D. Ill. Aug. 3, 1999) (Zagel, J.).

This leaves only plaintiffs' claim that Payday's use of the term "total payment" violates TILA. As Payday argues, Regulation Z allows the lender to omit the term "total of payments" when it does not apply, specifically when, as here, only one payment is required. *See* 12 C.F.R. § 226.18(h) n. 44. Plaintiffs argue that Payday did not

omit the term but rather used a non-conforming term. However, TILA does not bar Payday's use of what amounts to a more accurate term. *See Brown, supra.* While the inclusion of this non-conforming term with the other TILA-required information may have violated the "conspicuous segregation" requirements under § 1638(b), as we have held such violations do not give rise to statutory damages.

For these reasons, plaintiffs' TILA claims fail to state a claim upon which relief may be granted and must be dismissed. The Court declines to exercise jurisdiction over plaintiffs' state law claims. *See* 28 U.S.C. § 1367(b)(3).

Defendant's motion to dismiss is granted. Judgment will enter in favor of defendant.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DENISE LAWS v. PAYDAY LOAN CORP. OF ILLINOIS

No. 98 C 5562

September 30, 1999, Decided

MEMORANDUM OPINION AND ORDER

Plaintiff Denise Laws has brought this action against defendant Payday Loan Corporation of Illinois ("Payday"), alleging that Payday's loan disclosure statement violates the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and Federal Reserve Board Regulation Z, 12 C.F.R. part 226. In particular, Laws claims that the loan disclosure statement does not comply with 15 U.S.C. § 1632(a) and 12 C.F.R. §§ 226.17 and 226.18 because the terms "annual percentage rate" and "finance charge" were not disclosed more conspicuously than other terms.

Payday has moved to dismiss, arguing that the loan disclosure statement complied with TILA and Regulation Z and, in a supplemental brief, that Laws has failed to allege actual damages. Laws filed a motion for summary judgement as to liability and a motion for class certification. For the reasons set forth below, Payday's motion to dismiss is granted, Laws' motion for summary judgment is denied, and Law's motion for class certification is denied as moot.

Payday is an Illinois corporation that makes consumer loans in Chicago. On November 24, 1997, Laws

borrowed money from Payday. She received an Installment Note and Loan Disclosure statement. The Statement has four boxes near the top of the document. The boxes contain the terms "**ANNUAL PERCENTAGE RATE**," "**FINANCE CHARGE**," "**AMOUNT FINANCED**," and "**TOTAL OF PAYMENTS**" respectively. Each box contains a short description of the term and the actual percentage or dollar amount for each of the above terms for Law's loan.

Section 122(a) of TILA provides:

> (a) Information clearly and conspicuously disclosed; "annual percentage rate" and "finance charge"; order of disclosures and use of different terminology
>
> Information required by this subchapter shall be disclosed clearly and conspicuously in accordance with regulations of the Board. The terms "annual percentage rate" and "finance charge" shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transition, except information relating to the identity of the creditor. . . .

15 U.S.C. § 1632(a).

Section 226.17(a)(2) of Regulation Z provides that

> (2) The terms "finance charge" and "annual percentage rate," when required to be disclosed under section 226.18(d) and (e) together with a corresponding amount or percentage rate, shall be more conspicuous than any other disclosure, except the creditor's identity under section 226.18(a). . . .

12 C.F.R. § 226.17(a)(2).

The loan disclosure statement here clearly violates these provisions. The terms "finance charge" and "annual percentage rate" are not displayed more conspicuously than the other terms, i.e., "amount financed" and "total of payments." *See Brown v. C.I.L, Inc.*, 1996 U.S. Dist. LEXIS 4917 at *54-57, adopted 1996 U.S. Dist. LEXIS 4053 (N.D. Ill. 1996); *see also Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749, 751-52 (9th Cir. 1982).

Section 130 of TILA provides that "any creditor who fails to comply with any requirement imposed under this part" is liable for actual damages or specified statutory damages. 15 U.S.C. § 1640. However, 15 U.S.C. § 1640 also contains a provision limiting recovery of statutory damages to certain types of violations. In relevant part, this provision states that

> [i]n connection with the disclosures referred to in section 1638 of this title a creditor shall have liability determined under paragraph (2) [which provides for statutory damages] only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires disclosure of the "amount financed") (3), (4), (5), (6), or (9) of section 1638(a) of this title. . . .

15 U.S.C. § 1640.

Section 1638(a)(3) requires the creditor to disclose "[t]he 'finance charge' using that term." 15 U.S.C. § 1638(a)(3). Section 1638(a)(4) requires the creditor to disclose "[t]he finance charge expressed as an 'annual percentage rate', using that term." 15 U.S.C. § 1638(a)(4). However, neither § 1638(a)(3) or (4) requires the creditor to disclose those terms more conspicuously than other

terms.[1] As noted above, the "more conspicuously" requirement is found at 15 U.S.C . § 1632(a) and 12 C.F.R. § 226.17(a)(2). The provision in 15 U.S.C. § 1640 limiting damages to certain types of violations does not specify that a plaintiff may recover statutory damages for violations of 15 U.S.C. 1632(a) or for violations of 12 C.F.R. § 226.17(a)(2).

Nevertheless, Laws contends that she may recover statutory damages for her claim. She argues that she is seeking "statutory damages under § 1640(a)(2) for defendant's failure to disclose the 'finance charge' and 'annual percentage rate,' required under §§ 1638(a)(3) and (4), in the manner required by § 226.17(a)(2) of Regulation Z." (Pl.'s Resp. To Def. Supp. Mem. at 1-2). She notes that violations of Regulation Z constitute violations of TILA and argues that "[i]nsofar as Regulation Z prescribes the manner in which the annual percentage rate and finance charges are disclosed, it implements §§ 1638(a)(3) and (4)." (Id. at 4).

In other words, Laws argues that the sections requiring creditors to disclose the finance charge and annual percentage rate, §§ 1638(a)(3) and (4), incorporate the disclosure requirements in Regulation Z, including the requirement that "finance charge" and "annual percentage rate" be disclosed "more conspicuously." Thus, according to Laws, violations of the "more conspicuously" requirement should be viewed as violations of

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[1] In addition, § 1635 and the other paragraphs of § 1638 mentioned in the statutory damages limitation of § 1640 are not related to the disclosure of the "finance charge" or the "annual percentage rate" and so are not relevant here.

§§ 1638(a)(3) and (4), for which statutory damages are permitted. This court might well be persuaded by this argument, but for the fact that the "more conspicuously" requirement is now included in the statute, at § 1632(a).

The provision limiting statutory damages to certain types of TILA violations was included in a 1980 amendment to TILA. Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, tit. VI, 94 Stat. 132, 168 (1980). The provision was added to preclude statutory damages for merely technical violations of TILA. *See* S. Rep. No. 368 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S.C.C.A.N. 236, 252. The same 1980 amendment added the provision in 15 U.S.C. § 1632(a) requiring a creditor to disclose the terms "finance charge" and "annual percentage rate" more conspicuously than other terms. Prior to the 1980 amendment, the "more conspicuously" requirement was found only in Regulation Z.

Because there appear to be contradictory indications, it is difficult to divine congressional intent. On the one hand, Congress apparently believed that the "more conspicuously" disclosure requirement was important enough that it should be included in the statute itself, at § 1632(a). On the other hand, Congress did not specify in the new damages limitation provision of § 1640 that violations of § 1632(a) would allow recovery of statutory damages.

However, this court need not try to reconcile the seeming contradictions because the language of the statute is clear. The damages limitation provision states that

> [i]n connection with the disclosures referred to in section 1638 of this title a creditor shall have

> liability determined under paragraph (2) [which provides for statutory damages] only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title. . . .

15 U.S.C. § 1640. Laws' claim is "in connection with disclosures referred to in section 1638" because her claim involves a "closed end" credit transaction. The "more conspicuously"disclosure requirement is found at § 1632(a), but the damages limitation provision does not specify that statutory damages can be recovered for violations of § 1632(a). Moreover, the damages limitation provision of § 1640 does not regulate the availability of statutory damages merely for § 1638 violations. It explicitly states that statutory damages are available only for violations of specified subsections of § 1638 *and* for violations of § 1635. If Congress had intended to permit plaintiffs to recover statutory damages for violations of § 1632(a), it could have so specified.[2] Finally, because the "more conspicuously" disclosure provision in § 1632(a) was added at the same time as the provision in § 1640 limiting statutory damages to certain TILA violations, it is unlikely that the failure to include § 1632 violations in

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[2] Perhaps it could be argued that Congress assumed that a violation of § 1632(a) would be treated as a violation of §§ 1638(a)(3) and (4). However, Congress could easily have specified that statutory damages are permitted for violations of § 1632(a), and, in the absence of any indication that Congress intended that violations of § 1632(a) be treated as violations of §§ 1638(a)(3) and (4), this court will not presume that Congress so intended.

the list of violations for which statutory damages are recoverable is an oversight.

Laws cites several cases in which courts have awarded statutory damages for violations of the same or similar disclosure requirements. However, one of those cases was decided before the provision limiting statutory damages went into effect. *See Dixey*, 677 F.2d at 753. In the other cases, the courts did not discuss whether it was appropriate to award statutory damages in light of the provision limiting statutory damages to certain types of violations. *See, e.g., Herrera v. First Northern Sav. & Loan Ass'n*, 805 F.2d 896 (10th Cir. 1986); *Brown*, 1996 U.S. Dist. LEXIS 4917, adopted 1996 U.S. Dist. LEXIS 4053; *Hemauer v. ITT Fin. Serv.*, 751 F. Supp. 1241, 1245 (W.D. Ky. 1990).

Laws argues that if statutory damages are not permitted for violations like those here, the policies underlying TILA will be thwarted. For example, she suggests that a creditor could avoid the deterrent effect of statutory damages merely by making the required disclosures in microscopic type.[3] This is not the case. The violation here is a technical violation for which Congress has indicated that statutory damages will not be permitted.

Laws has not alleged actual damages from the TILA violation. Therefore her claim must be dismissed. Because

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[3] In such a case, it might be possible for a plaintiff to argue that because of the microscopic type there was no disclosure, which would allow the plaintiff to collect statutory damages. Moreover, even in cases such as the one at bar where statutory damages are not allowed, a plaintiff may still recover any actual damages, and the creditor could still be subject to administrative enforcement under 15 U.S.C. § 1607.

Laws' claim is dismissed for failure to plead actual damages, her motion for class certification is denied as moot.

CONCLUSION

Payday's motion to dismiss [9] is granted. Laws' motion for summary judgement [6 & 11] is denied. Laws' motion for class certification [8] is denied as moot.

ENTER:

/s/ JOAN B. GOTTSCHALL
United States District Judge

Dated: September 30, 1999

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID SHABAS v. LIGHTHOUSE FINANCIAL GROUP OF ILLINOIS, INC. ET AL.

No. 99 C 4501

October 15, 1999, Decided

MEMORANDUM OPINION AND ORDER

Plaintiff David Shabas ("Shabas") brought this class action against defendants Lighthouse Financial Group of Illinois, Inc., Andrew J. May, and John Does 1-10 (hereinafter referred to collectively as "defendants"), alleging a violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* (Count I), unconscionability under Illinois law (Count II), and violation of the Illinois Consumer Fraud Act (Count III). This action arises out of Shabas entering into a loan with defendants at an annual percentage rate of not less than 216% on or about March 2, 1999. In connection with that transaction, Shabas received a combination note and TILA disclosure statement. As a condition of the loan, Shabas was required to give defendants his automobile title as security. Defendants have moved to dismiss this action pursuant to Rule 12(b)(6) and Rule 12(b)(1) of the Federal Rules of Civil Procedure. For the following reasons, defendants' motion to dismiss is hereby GRANTED.

DISCUSSION

In ruling on a motion to dismiss, the court must presume all of the well-pleaded allegations of the complaint to be true. *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2, 97 S. Ct. 2490, 2492 n.2 (1977). The court must view those allegations in the light most favorable to the plaintiff. *Gomez v. Illinois State Bd. Of Educ.*, 811 F.2d 1030, 1039 (7th Cir. 1987). Dismissal under Rule 12 (b)(6) is proper only if it appears "beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); *see also Panares v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 791 (7th Cir. 1996).

I. Alleged Violations of TILA – Count I

Shabas claims that the TILA disclosure statement failed to comply with the requirements of 15 U.S.C. § 1638 and 12 C.F.R. §§ 226.17 and 226.18 because it inserted a disclosure for "monthly percentage rate" in the federal disclosures. Shabas claims that this extraneous item makes the required federal disclosures of "annual percentage rate" and "finance charge" less conspicuous than any other item. Essentially, Shabas argues that, under this type of credit, defendants must only make the "the annual percentage rate" and "financial charge" more conspicuous than any other terms. Shabas also claims that the description of defendants' rights with respect to their security interest is misleading. Thus, Shabas claims that he and the class members are entitled to statutory damages provided under 15 U.S.C. § 1640 as well as

attorney's fees, litigation expenses and costs, and any other relief this court deems appropriate.

A. Alleged Violation of Conspicuous Disclosure Requirement

Under TILA, a creditor must "conspicuously segregate[] from all other terms, data, or information provided in connection with a transaction, including any computations or itemization" certain TILA disclosures. 15 U.S.C. § 1638(b)(1). Under the regulations, "[t]he creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under § 226.18." 12 C.F.R. § 226.17(a)(1). The regulations, however, require that "[t]he terms 'finance charge' and 'annual percentage rate,' when required to be disclosed under § 226.18(d) and (e) together with a corresponding amount or percentage rate, shal[1] be more conspicuous than any other disclosure, except the creditor's identity under § 226.18(a)." 12 C.F.R. § 226.17(a)(2).

Shabas argues that defendants violated TILA by "more conspicuously" disclosing the "monthly percentage rate" with the "finance charge" and "annual percentage rate," thereby making the required federal disclosures less conspicuous. Shabas, however, ignores the clear mandate of 12 C.F.R. § 226.17(a)(2), which states that the "finance charge" and "annual percentage rate", "together with a corresponding amount or percentage

rate, shall be more conspicuous than any other disclosure." *Id.* In this case, defendants are merely complying with the mandates of TILA by more conspicuously indicating the corresponding percentage rate under TILA, that being the monthly percentage rate of 18%. Therefore, the fact that it is equally prominent with the finance charge and annual percentage rate does not show that defendants' forms fail to comply with the express terms of TILA. Instead, defendants made the proper federal disclosures more conspicuous than other terms by capitalizing them, bolding them, and setting them off with a thick black line.

Accordingly, this court finds as a matter of law that defendants' form complies with the express terms of TILA.[1]

Consequently, because this court finds that Shabas can prove no set of facts which entitle him to relief, this court must dismiss his claim regarding a conspicuous disclosure of TILA.

B. Alleged Misleading Disclosure of Security Interest

Under TILA, a creditor is required to make several disclosures, including a statement when the credit is secured that a security interest has been taken in "(A) the

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[1] Because this court found that defendants' form complied with TILA, this court need not address whether a plaintiff is required to plead or prove that he suffered actual damages to maintain a claim for alleged violation of the conspicuous disclosure requirement.

property which is purchased as part of the credit transaction, or (B) property not purchased as part of the credit transaction identified by item or type." 15 U.S.C. § 1638(a)(9). In addition, a creditor is also required to include a statement that the consumer should refer to the appropriate contract document for any information about default. *Id.* § 1638(a)(12). With respect to the security interest, the regulations only require that the disclosure indicate "[t]he fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type." 12 C.F.R. § 226.18(m).

Shabas argued that defendants inaccurately disclosed their security interest in Shabas's automobile because it conveyed the impression that they can keep Shabas's automobile at will. Shabas acknowledges that the TILA disclosure indicates that defendant is taking a security interest in Shabas's automobile, in compliance with TILA, as well as complying with TILA for directing Shabas to the "Loan Agreement" for additional information about default. Shabas argues, however, that the Loan Agreement states that upon default, defendants can immediately repossess the automobile and that if the borrower does not redeem it, defendants become the sole owner of the automobile. Shabas argues that this is misleading because under the Uniform Commercial Code, defendants could not keep the repossessed automobile at will, but rather either sell or propose to keep it in full satisfaction of their obligation under the UCC. Defendants argue that as a matter of law they satisfied the limited TILA disclosure requirements for security interests.

Shabas has conceded that defendants have adequately complied with TILA, but nevertheless argues that because the statement found in the Loan Agreement is inaccurate, defendants have violated TILA. While it is true that TILA requires "accurate disclosures" of the information that is actually disclosed, *Gibson v. Bob Watson Chevrolet Geo*, 112 F.3d 283, 285 (7th Cir. 1997), this court finds as a matter of law there is nothing inaccurate with the disclosures on security interest. As noted by Shabas, defendants can either sell the automobile or seek a deficiency judgement or propose to keep the automobile as full satisfaction of the obligation under Illinois law and the Uniform Commercial Code. (Pl's Brief at 12). In this case, defendants have merely indicated their intention to retain the automobile in satisfaction of obligations in the event of a default. This court could find no law indicating that this premature disclosure of its intentions violates TILA. Regardless, all that is required under TILA is a statement that a security interest has been taken or will be taken and indication to the consumer to refer to the appropriate contract document for any information about default when a security interest is taken. Defendants complied with TILA.

Consequently, this court finds that Shabas can prove no set of facts in support of his claim which would entitle him to relief. Therefore, this court must dismiss Shabas's TILA claim regarding the alleged misleading security interest. Accordingly, because this court must dismiss both of Shabas's TILA claims, Count I is hereby dismissed.

II. State Law Claims – Count II and III

In Counts II and III, Shabas alleges state law claims of unconscionability and violation of Illinois Consumer Fraud Act. This court, having granted defendants' motion to dismiss on Count I, which provided this court with federal subject matter jurisdiction, declines to exercise supplemental jurisdiction over Shabas's state law claims under Counts II and III. 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130 (1966). Without addressing the merits of Shabas's state laws claims, this court dismisses Counts II and III.

CONCLUSION

For the above stated reasons, defendants' motion to dismiss Count I is GRANTED with prejudice. This court dismisses Counts II and III of plaintiff [Shabas'] complaint without prejudice. All other pending motions are moot.

ENTER:

/s/ JAMES F. HOLDERMAN

United States District Judge

DATE: October 15, 1999

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID SHABAS v. LIGHTHOUSE FINANCIAL GROUP OF ILLINOIS, INC. ET AL.

No. 99 C 4501

November 9, 1999, Decided

JUDGE: James F. Holderman

ORDER

On October 18, 1999, this court granted defendants Lighthouse Financial Group of Illinois, Inc., Andrew J. May, and John Does 1-10 (hereinafter referred to as "defendants") motion to dismiss plaintiff David Shabas's ("Shabas") complaint. In this court's Order, this court found that as a matter of law defendants' form complied with the express terms of the Truth in Lending Act ("TILA") and dismissed Count I with prejudice. This court also dismissed Counts II and III without prejudice because this court declined to exercise supplemental jurisdiction over the state law claims. Plaintiff Shabas has now filed a motion to reconsider this court's dismissal of the alleged conspicuous disclosure violation under TILA in Count I. After review of the relevant law, this court must deny plaintiff's motion to reconsider.

A motion for reconsideration allows for a correction of a court's order in circumstances where: (1) the court has misunderstood a party, (2) the court has made a decision outside the adversarial issues presented to the court by the parties, (3) the court has made an error of

apprehension (not reasoning), (4) a significant change in the law has occurred, (5) significant new facts have been discovered. *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). Motions to reconsider should not be used, however, to introduce new theories for the first time or to rehash old arguments.

Recently, the Seventh Circuit held that whether or not a defendant creditor's "practices run afoul of Regulation Z is a factual issue." *Smith v. The Cash Store Management*, No. 99-2472, 1999 WL 977368, *3 (7th Cir. Oct. 27, 1999). In stating the law as such, the Seventh Circuit made it clear that the issue in this case, whether defendants' form complies with TILA, is a factual issue that must be left to the trier of fact. Thus, after a review of the Order dated October 15, 1999 following the recent Seventh Circuit's decision, this court must reconsider its decision. Based on this change in the law, it appears that this court should vacate its previous Order and reinstate the case. Unfortunately for plaintiff, however, this court did not address an issue raised by defendants that is fatal to plaintiff's TILA claim. In this court's Order dated October 15, 1999, this court stated that it would not address the issue of whether a plaintiff must plead or prove that he or she suffered actual damages to maintain a claim for an alleged violation of TILA's conspicuous disclosure requirement because this court found that defendants' form complied with TILA. Therefore, this court must address defendants' arguments before this court decides whether it should reinstate the case.

Defendants argue that even if there is a technical violation of TILA's conspicuous disclosure requirement, the TILA claim still fails because plaintiff has failed to

allege actual damages. This court agrees. The plain language of TILA establishes that a plaintiff may only recover actual damages for a violation of the conspicuous disclosure requirement. *See* 15 U.S.C. § 1640 (restricting statutory damages to other violations of TILA, but not a violation of the "conspicuous disclosure" requirement). This court agrees with my esteemed colleagues' reasoning and rationale in unanimously holding that TILA does not provide for statutory damages for violations of TILA's conspicuous disclosure requirement. *See Laws v. Payday Loan Corp. of Illinois*, No. 98 C 5562, 1999 WL 966964 (N.D. Ill. Oct. 1, 1999) (Gottschall, J.); *Brown v. Payday Check Advance*, No. 99 C 2074 (N.D. Ill. Aug. 3, 1999) (Zagel, J.); *Groth v. Rohr-ville Motors*, No. 95 C 5429, 1997 WL 630189, *3 (N.D. Ill. Sept. 30, 1997) (Williams, J.); *Grant-Davis v. Toyota on Western, Inc.*, 95 C 43, 1995 WL 124128, *4 (N.D. Ill. Mar. 21, 1995) (Hart, J.). Therefore, because plaintiff only alleges statutory damages, this court must dismiss plaintiff's claim for failure to state a claim.

For the above stated reasons, plaintiff's motion to reconsider is DENIED. Because this court is now dismissing the case for failure to allege actual damages, Count I's conspicuous disclosure claim under TILA is dismissed without prejudice. Plaintiff David Shabas is given until November 23, 1999 to file an Amended Complaint if it can be done consistent with this court's Orders, the Truth in Lending Act, and Federal Rule of Civil Procedure 11.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VALERIE SMITH v. THE CASH STORE
MANAGEMENT, INC. ET AL.

No. 99 C 1726

June 1, 1999, Decided

MEMORANDUM OPINION AND ORDER

Valerie D. Smith ("Smith") sues The Cash Store, Ltd., The Cash Store Management, Inc., and The Cash Store Management, Inc.'s officers and directors (collectively, "Cash Store") on behalf of a putative class for violations of the Truth in Lending Act, 15 U.S.C § 1601 *et seq.* (TILA) (Count I and II), for relief from an unconscionable loan contract (Count III) and for violations of the Illinois Consumer Fraud Act (Count IV). Cash Store moves to dismiss Counts I and II for failure to state a claim, and moves to dismiss Counts III and IV for lack of jurisdiction.

BACKGROUND

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations as true. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1428 (7th Cir. 1996). Cash Store is a Texas limited partnership that operates at least sixteen loan establishments in Illinois. Am. Comp. at 4. Cash Store specializes in making short-term, high interest "payday" loans. *Id.* at ¶¶ 9, 10. The loans are typically two weeks in duration and carry annual percentage rates greater than 500%. *Id.*

at ¶ 10. At the end of the two week term, the customer has the option of continuing the loan for an additional term by paying only the interest. *Id.*

Between June 13, 1998 and September 19, 1998, Smith obtained eight loans from Cash Store. *Id.* at ¶ 14. The loan amounts ranged from $500 to $750, and each loan carried an annual percentage rate of 521.43%. *Id.* at 15. On occasion, Smith signed a standard form customer loan agreement. *Id.* at 16. The receipt disclosed the finance charge as either a "deferred deposit extension fee" or a "deferred deposit check fee" depending on whether the loan was an original loan or an extension of an existing loan. *Id.* The terms "deferred deposit extension fee" and "deferred deposit check fee" were printed in red ink. *Id.* Each of the consumer loan agreements states, "Security: Your post-dated check is security for this loan." *Id.* at 21.

Smith contends Cash Store's practices violate TILA and implementing regulations in two respects. First, she contends that the receipt stapled to the top of the loan documents violated 12 C.F.R. §§ 226.17 and 226.18, which require a creditor to disclose the finance charge and annual percentage rate, labeled as such, in terms more conspicuous than any other disclosures. Smith contends that by stapling the receipt to the top of the loan documents, Cash Store physically obscured the required disclosures on the loan documents. She also contends that by describing the finance charge as a "deferred deposit extension fee" or "deferred deposit check fee" on the receipt, Cash Store contradicted the required disclosures. Next, Smith contends Cash Store violated 12 C.F.R. § 226.18, which requires accurate disclosure of any security interest, by stating that the borrower's post-dated

check serves as security for the loan. According to Smith, simply retaining the post-dated check does not create a security interest under Illinois law.

Smith also claims that Cash Store's loan contracts are unconscionable because Cash Store charges grossly exorbitant interest rates and fails to make proper disclosures in connection with the loans. Smith also contends Cash Store's practice of charging high interest rates without making proper disclosures violates the Illinois Consumer Fraud Act.

Cash Store moves to dismiss Smith's TILA claims pursuant to Fed. R. Civ. P. 12 (b) (6), arguing that Smith's allegations fail to state a TILA claim. Cash Store moves to dismiss the state law claims under Fed. R. Civ. P. 12(b) (1). Cash Store contends that if the federal claims are dismissed, this court has no basis for exercising pendent jurisdiction over the state law claims. Cash Store also argues that even if the federal claims are not dismissed, the court should decline to exercise pendent jurisdiction over the state law claims because those claims present novel questions of state law, the state law claims predominate over the federal claims, and the regulation of interest rates in Illinois is better left to the state courts and legislature.

DISCUSSION

I. Standards on a Motion to Dismiss

On a motion to dismiss, the court must decide "whether relief is possible under any set of facts that

could be established consistent with the allegations." *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir. 1992) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). A claim may be dismissed only if it is beyond doubt that under no set of facts would the allegations entitle the plaintiff to relief. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1429-30 (7th Cir. 1996). The court must accept all well-pleaded allegations in the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *Id.* at 1429.

II. The Receipt

Smith claims the receipt stapled to the top of the loan documents violated 12 C.F.R. §§ 226.27 and 226.18 both by physically obscuring the required finance charge and percentage rate disclosures and by contradicting the required disclosures. There is not dispute that the disclosures on the loan documents themselves satisfy TILA.

Smith's contention that Cash Store physically obscured the required disclosures is without merit. As an initial matter, the court notes the finance charge and annual percentage rate are disclosed in bold type in the center of a standard 8½" by 11" sheet of paper. Pl. Br. at Ex. F. The receipt is significantly smaller – only a few inches wide and not as long as the 11" sheet of paper. Assuming the receipt was stapled to the upper left hand

corner of the loan documents, as is common, the receipt would not obscure the disclosures.[1]

Even assuming the receipt was stapled to the center of the loan document, thereby covering disclosures, the Cash Store would not have violated TILA. Smith argues that Cash Store "would not seriously contend that they complied with the TILA if they erased their disclosures or covered them with white-out." Pl. Br. at 12. But that is not the situation. If Cash Store erased the disclosures or covered them with white-out, Smith would be unable to read the disclosures. But Smith had only to lift the receipt to see the disclosures printed in boldface. The receipt did not physically obscure the disclosures in such a way as to make the disclosures ineffective under TILA.

Smith next contends Cash Store obfuscated the finance charge by referring to it as a "deferred deposit check fee" in red ink on the receipt. According to Smith, the receipt contradicted the required disclosure so that "an unsophisticated consumer would be scratching his head upon receipt of such a [document.] He wouldn't have a clue as to what he was supposed to do." Pl. Br. at 12 (*quoting Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996)). In determining whether the allegedly contradictory disclosures violate TILA, this court must determine whether an unsophisticated borrower could have been confused or mislead by the documents. Smith could not have been confused by the receipt. The receipt is an insignificant and unofficial-looking document in comparison with the

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[1] The copy of the receipt furnished the court bears a staple mark in the upper left hand corner. Pl. Br. at Ex. F. The court could discern no staple marks on the loan document itself.

attached loan document. The "deferred deposit check fee" is a single, small entry on the receipt.[2] The loan document, on the other hand, disclosed the finance charge and interest rate in large, boldface type in a conspicuous position on the front of the loan document. Even an unsophisticated borrower, receiving the two documents together, could not be confused as to the terms of the loan.

The cases Smith cites in support of her position are easily distinguishable. In *Jenkins v. Landmark Mtge. Corp.*, 696 F.Supp. 1089 (W.D. Va. 1988), the creditor's TILA statement provided a required statement of the borrower's right to cancel a mortgage transaction. However, the creditor included a cover letter that disclosed a different deadline for exercising the right to cancel. *Jenkins*, therefore, involved two irreconcilable disclosures directly pertaining to the borrower's rights under TILA, so that the borrower "would be scratching his head" and "wouldn't have a clue as to what he was supposed to do." Cash Store's disclosures were not contradictory as were the disclosures in *Jenkins* – Cash Store's receipt did not disclose a finance charge *different* from the finance charge on the loan documents. Nor were Cash Store's disclosures, considering the totality of the circumstances (including the size and nature of the allegedly contradictory document), likely to confuse the borrowers as were the disclosures in *Jenkins*. *Jenkins* is inapposite.

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[2] Smith points out the "deferred deposit check fee" is emphasized because it is printed in ink, but other entries on the receipt are also printed in red ink. Pl. Br. at [illegible]x. F.

Smith also relies on *Rodash v. AIB Mtge. Co.*, 16 F.3d 1142 (11th Cir. 1994), in which the creditor required the debtor to sign a notice of the right to rescind the transaction. However, the creditor structured the notice in such a way that by signing it, the borrower not only acknowledged receipt of the notice, but also waived the right to rescind. *Rodash* is inapposite to this case for the same reasons as *Jenkins*. The disclosures in *Rodash* directly contradicted each other in such a way as to hopelessly confuse the borrower. Cash Store's practice of stapling a small receipt to its TILA disclosures could not reasonably confuse or mislead Smith as to the terms of the loan.

III. The Post-Dated Check as Security

15 U.S.C. § 1638 and 12 C.F.R. § 226.18 require creditors to accurately disclose any security interest and describe the property in which the interest is taken. Smith contends the statement in Cash Store's loan documents, that "[y]our post-dated check is security for this loan," violates the TILA because, under Illinois law, the check cannot serve as security.

Smith misapplies Illinois law. UCC § 3-409(1) states, "A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." *See also* 810 ILCS 5/3-408. Smith correctly interprets this language as meaning that a check does not operate as an assignment of, or create a security interest in, the funds *in the underlying bank account*. But Cash Store did not purport to take Smith's *checking account* as security; it took her *check* as

security. The check itself has value – Cash Store's possession of the check gives it certain rights to the funds in Smith's checking account. Nothing in the UCC prevents Cash Store from requiring borrowers to pledge a post-dated check as security for the loan. To say that a check cannot provide security for a loan because the check does not create a security interest in the underlying funds is a *non sequitur.*

IV. The Remaining State Law Claims

Smith's TILA claims are dismissed. As the remaining claims are premised on state law and not federal law, the court has no independent jurisdiction over them. Accordingly, the court dismisses all remaining claims pursuant to 28 U.S.C. § 1367 (c) (3).

CONCLUSION

The motion to dismiss is granted. Counts I and II are dismissed with prejudice, Counts III and IV are dismissed without prejudice.

ENTER:

/s/ Suzanne B. Conlon
United States District Judge

June 1, 1999

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

VALERIE D. SMITH,

Plaintiff-Appellant,

v.

THE CASH STORE MANAGEMENT, INC.; THE CASH STORE, LTD.; HAROLD L. AHLBERG; TREVOR L. AHLBERG; and JOHN DOES 1-10,

Defendants-Appellees.

No. 99-2472

October 27, 1999, Decided

Before Flaum, Manion, and Diane P. Wood, Circuit Judges.

Flaum, Circuit Judge. Valerie Smith sued The Cash Store, Ltd.; The Cash Store Management, Inc.; and The Cash Store Management, Inc.'s officers and directors (collectively "Cash Store") on behalf of a putative class for violations of the Truth in Lending Act ("TILA"), 15 U.S.C. sec. 1601 et seq., and Illinois state contract law and consumer fraud statutes. This is an appeal from the district court's dismissal of Smith's suit for failure to state a claim under TILA. For the reasons set forth below, we affirm in part and reverse in part.

Background

Cash Store operates at least sixteen loan establishments in Illinois. These establishments specialize in making short-term, high interest "payday loans," typically

two weeks in duration and carrying annual percentage rates greater than 500%. When a Cash Store customer is granted a loan, the customer writes out a check, post-dated to the end of the loan period, for the full amount that he is obligated to pay. At the end of the two week period, the customer has the option of continuing the loan for an additional two week period by paying the interest.

Between June 13, 1998 and September 19, 1998, Smith obtained eight such loans from Cash Store. On each occasion she signed a standard "Consumer Loan Agreement" form. Each loan agreement stated an annual interest rate of 521%. Each loan agreement also contained the statement: "Security. Your post-dated check is security for this loan." Upon entering into or renewing each loan, Cash Store stapled to the top of the loan agreement a receipt which labeled the finance charge in red ink as either a "deferred deposit extension fee" or a "deferred deposit check fee," depending on whether the transaction was a renewal or an original loan.

The details of the loan agreement are important because the content and presentation of such agreements are regulated under TILA, 15 U.S.C. sec. 1601 et seq., and implementing Federal Reserve Board Regulation Z ("Regulation Z"), 12 C.F.R. sec. 226. Congress enacted TILA to ensure that consumers receive accurate information from creditors in a precise, uniform manner that allows consumers to compare the cost of credit from various lenders. 15 U.S.C. sec. 1601; *Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 220 (1981). Regulation Z mandates that: "The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form

that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the [required] disclosures. . . . " 12 C.F.R. sec. 226.17(a)(1). The mandatory disclosures, which must be grouped in a federal disclosure section of a written loan agreement, include, among other things, the finance charge, the annual percentage rate, and any security interests that the lender takes. 12 C.F.R. sec. 226.18.

On March 16, 1999, Smith filed a class action complaint, amended on April 6, 1999, against Cash Store in the United States District Court for the Northern District of Illinois. She sued on behalf of a putative class for violations of TILA, for relief from an unconscionable loan contract, and for violations of the Illinois Consumer Fraud Act. The district court dismissed with prejudice the TILA claims for failure to state a claim upon which relief can be granted, Fed.R.Civ.P. 12(b)(6), and then exercised its discretion to dismiss without prejudice the remaining supplemental state claims, as permitted by 28 U.S.C. sec. 1367(c)(3).

Discussion

Smith argues on appeal that two of Cash Store's practices violate TILA, and that the district court's dismissal of the claims was therefore erroneous. The first practice relates to the receipts that Cash Store routinely stapled to the top of Smith's loan agreements. Smith contends that the receipts physically obscured the required federal disclosures and that they characterized the finance charges in a misleading way. The second

practice relates to the security interest disclosures, which Smith contends were inaccurate. We address each of these allegations in turn.

The Receipt Claim

TILA requires that a creditor make the required disclosures "clearly and conspicuously in writing. . . . " 12 C.F.R. sec. 226.17. Smith alleges that the cash register receipt that Cash Store stapled to the upper lefthand corner of the loan agreements physically covered up some of the required disclosures. Furthermore, on her receipts were printed, in red, the terms "deferred deposit extension fee" or "deferred deposit check fee," whereas the term "finance charge" is used in the federal disclosure box. Smith argues that both of these practices render the required disclosures on the loan agreement neither "clear" nor "conspicuous."

The district court dismissed the claim relating to the Cash Store receipt on the ground that the allegations did not state a cause of action. It held that neither Cash Store's stapling of a receipt to the loan documents nor the printed contents of the receipt violated TILA, having found that "Cash Store's practice of stapling a small receipt to its TILA disclosures could not reasonably confuse or mislead Smith as to the terms of the loan." *Smith v. Cash Store Mgmt., Inc.*, No. 99 C 1726, 1999 WL 412447, at *3 (N.D. Ill. June 8, 1999).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts to support his claim which would entitle him to relief. *Conley v. Gibson*, 355

U.S. 41, 45-46 (1957); *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 648 (7th Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Caremark*, 113 F.3d at 648 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). As we recently stated, "Rule 12(b)(6) should be employed only when the complaint does not present a legal claim." *Johnson v. Revenue Mgmt. Corp.*, 169 F.3d 1057, 1059 (7th Cir. 1999). Because the district court may not dismiss the complaint under Rule 12(b)(6) unless it is legally insufficient, we review that decision de novo. *Caremark*, 113 F.3d at 648.

As noted above, Regulation Z requires that "[t]he creditor shall make the disclosures required by this subpart clearly and conspicuously." 12 C.F.R sec. 226.17. The "sufficiency of TILA-mandated disclosures is to be viewed from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor." *Cemail v. Viking Dodge*, 982 F. Supp. 1296, 1302 (N.D. Ill. 1997).

Whether or not Cash Store's practices run afoul of Regulation Z is a factual issue, and the district court therefore erred in dismissing the receipt claims under Rule 12(b)(6). In her amended complaint, Smith contends that the stapled receipt contradicted and obfuscated the required disclosures. Am. Compl., para. 19. Her claim may fail on the facts, "but assessing factual support for a suit is not the office of Rule 12(b)(6)." *Johnson*, 169 F.3d at 1059. Although our holding does not preclude Cash Store from arguing, at the summary judgment stage, that Smith cannot prove her claims, Smith's complaint alleging that the stapled receipt obscured the disclosures and that the

printed contents of the receipt were confusing or misleading states a valid legal claim under TILA, and that is sufficient to pass Rule 12(b)(6) scrutiny.

The Security Interest Claim

Smith also contends that the district court erred in holding that Cash Store's statement, "Your post-dated check is security for this loan," was a lawful disclosure under TILA. TILA requires creditors to disclose accurately any security interest taken by the lender and to describe accurately the property in which the interest is taken. 15 U.S.C. sec. 1638; 12 C.F.R. sec. 226.18. Regulation Z defines "security interest" as "an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law." 12 C.F.R. sec. 226.2(a)(25). Smith contends that Cash Store's statement in the loan agreement violates TILA because, under Illinois law, the check does not serve as security.

Subject to narrow exceptions, "hypertechnicality reigns" in the application of TILA. *Cowen v. Bank United of Texas*, FSB, 70 F.3d 937, 941 (7th Cir. 1995). Regulation Z specifies that certain federal disclosures must be grouped together in the loan agreement and also directs that the agreement "not contain any information not directly related to the [required] disclosures." 12 C.F.R. sec. 226.17(a)(1). In *Bizier v. Globe Financial Services Inc.*, the First Circuit explained that overinclusive security interest disclosures "cannot be dismissed as de minimis or hypertechnical." Overinclusive disclosures might deter a borrower's "future borrowing or property acquisition out of

an exaggerated belief in the security interest to which they would be subject, or [give] a lender an apparent right which, even if ultimately unenforceable, could serve as a significant bargaining lever in any future negotiations concerning rights or obligations under the loan." 654 F.2d 1, 3 (1st Cir. 1981); *see also Tinsman v. Moline Beneficial Fin. Co.*, 531 F.2d 815, 818-19 (7th Cir. 1976) (holding that an overbroad disclosure of security interests violated TILA)./1 All TILA disclosures must be accurate, *Gibson v. Bob Watson Chevrolet-Geo, Inc.*, 112 F.3d 283, 285 (7th Cir. 1997), and lenders are generally strictly liable under TILA for inaccuracies, even absent a showing that the inaccuracies are misleading, *Brown v. Marquette Savings and Loan Assoc.*, 686 F.2d 608, 614 (7th Cir. 1982). Smith contends that if the check that Smith handed over upon agreeing to the loan does not give Cash Store a security interest, then its statement to that effect violates TILA.

Cash Store first responds that the check acts as "security" because it gives Cash Store alternate routes to collect its debt. The check might facilitate payment because the loan agreement provides that Cash Store may deposit it on the loan due date if another form of payment is not made. If the check were to bounce, Cash Store could sue Smith under Illinois "bad check" statutes. According to Cash Store, the check then "secures" the loan by making repayment easier or by placing Cash Store in a stronger litigating position under Illinois law if Smith does not pay back the loan. Hence, the statement "Security: Your post-dated check is security for this loan" is accurate, and perhaps even required under TILA.

This argument, standing alone, is incomplete because it confuses "security" with "security interest." True, Cash Store may be in a better position with the check than without it, and in that sense it may regard its loan as more "secure." But this is a broader sense of "security" than that contemplated by Regulation Z. The regulations define "security interest" – which is a term of art referring to a specific class of transactions – as "an interest in property that secures performance of a consumer credit obligation and that is recognized by state or federal law." 12 C.F.R. sec. 226.2(a)(25). Illinois commercial law, in turn, defines it as "an interest in personal property . . . which secures payment or performance of an obligation." 810 ILCS 5/1-201(37). By creating a security interest through a security agreement, a debtor provides that a creditor may, upon default, take or sell the property – or collateral – to satisfy the obligation for which the security interest is given. 810 ILCS 5/9-105(1)(c) (" 'Collateral' means the property subject to a security interest, and includes accounts and chattel paper which have been sold"). Because TILA restricts what information a lender can include in its federal disclosures, the question before us is not simply whether the post-dated check makes repayment more likely ("security") but whether it can meet the statutory requirements of "collateral" ("security interest").

Cash Store also maintains that Article 9 of the Illinois Uniform Commercial Code ("Illinois U.C.C."), which governs secured transactions, applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property . . . including . . . instruments." 810 ILCS 5/9-102(1)(a). Because the check

is an instrument, it can be used to create a security interest by the terms of the Illinois U.C.C. *See In re Brigance*, 234 B.R. 401, 404-05 (W.D. Tenn. 1999) (holding that, under Tennessee's U.C.C., a borrower's personal check can serve as collateral in which a security interest can be obtained).

We again believe that this argument is incomplete. While Article 9 of the Illinois U.C.C. generally authorizes the use of instruments as collateral to secure a loan, it is not immediately clear whether this provision applies to a post-dated check issued by the borrower.

Neither the ease of recovery in the event of default nor the simple fact that a check is an instrument are sufficient to create a security interest. It is the economic substance of the transaction that determines whether the check serves as collateral. *Cf. Cobb v. Monarch Finance Corp.*, 913 F. Supp. 1164, 1177-78 (N.D. Ill. 1995) (distinguishing between a mechanism set up to facilitate repayment of a loan and an interest that secures a loan in the event of default). Therefore, in turning to our resolution of whether Cash Store took a security interest, our analysis must focus on the economic substance of Smith's pledged check.

We begin with the premise that collateral must be of some value to secure a loan; it cannot simply be additional evidence of indebtedness. Prior to the U.C.C., courts had "uniformly" answered in the negative the question of whether "the pledge of an independent promise of the debtor to pay a sum of money can be made valid security for a debt." *New York Trust Co. v. Palmer*, 101 F.2d 1, 4 (2d Cir. 1939); *see also Union Nat'l Bank v.*

People's Savings & Trust Co., 28 F.2d 326, 328 (3d Cir. 1928) ("The term 'collateral security' implies the transfer to a creditor of an interest in or a lien on property, or an obligation which furnishes a security in addition to the responsibility of the debtor. The execution and delivery by the debtor of additional unsecured evidence of his indebtedness does not constitute collateral security."). Although we recognize that the U.C.C. has liberalized the scope of secured transactions, see 810 ILCS 5/9-101, U.C.C. cmt., we will assume that, even after Illinois' adoption of the U.C.C., collateral must have some value beyond the promise to pay contained in a loan agreement itself. *Cf. City of Chicago v. Michigan Beach Housing Coop.*, 609 N.E.2d 877, 886 (Ill. App. Ct. 1993) (holding that certain tax credits could not serve as collateral because they had "no independent value in and of themselves").

Smith argues that, having already promised contractually through the loan agreement to pay the amount printed on the check, the pledged check gives Cash Store no interest that it did not already have. The Illinois U.C.C. expressly provides that a check does not operate as an assignment of the bank account on which it is drawn. 810 ILCS 5/3-408. And the check itself has no intrinsic value beyond the minuscule value of a scrap of paper. According to Smith, then, the post-dated check does not secure the loan because it merely restates the promise to pay already contained in the loan agreement. *Hitner v. Diamond State Steel Co.*, 176 F. 384, 391-92 (C.C.D. Del. 1910) ("It hardly admits of discussion that the mere duplication or multiplication of a promise to pay or of an acknowledgment of liability to pay a certain sum representing the total real indebtedness to a creditor, whatever

may be its effect in furnishing in certain exigencies alternative or cumulative evidence of the real demand, cannot constitute collateral security.").

Smith may be correct that a second promise to pay, identical to the first, would not serve as collateral to secure a loan, because the second promise is of no economic significance: in the event that the borrower defaults on the first promise, the second promise to pay provides nothing of economic value that the creditor could seize and apply towards repayment of the loan. In this case, however, the post-dated check is not merely a second, identical promise. It is, indeed, a promise to pay the same amount as the first, but it has value to the creditor in the event of default beyond the value of the first promise. That is because a holder of both the loan and the check has remedies available to him that a holder of only the loan agreement does not. For example, the holder of the check has available remedies created by the Illinois bad check statute, 810 ILCS 5/3-806, which mandates that if a check is not honored, the drawer shall be liable for interest and costs and expenses incurred in the collection of the amount of the check.

Smith's own statement that the check is of no intrinsic value is instructive: it is its extrinsic legal status and the legal rights and remedies granted the holder of the check, like the holder of a loan agreement, that give rise to its value. Upon default on the loan agreement, Cash Store would get use of the check, along with the rights that go with it. Cash Store could simply negotiate it to someone else. Cash Store could take it to the bank and present it for payment. If denied, Cash Store could pursue bad check litigation. Additional value is created

through these rights because Cash Store need not renegotiate or litigate the loan agreement as its only avenue of recourse.

It is not important that, as Smith argues, by the time Cash Store gets use of the check it might be clear that Smith would not or could not make good on a promise for that amount. Cash Store's likelihood of, for example, successfully pursuing bad check litigation goes to the issue of valuation of the check (one might roughly calculate it as its face value plus supplementary awards created by the bad check statute, discounted by the probability of successfully pressing the claim) not the issue of whether the check has any value beyond the promise contained in the original loan agreement. In the same way, there is the chance that Smith would call her bank and cancel the post-dated check before the loan's due date, but this potentiality, depending on how the loan agreement might affect her legal right to do so, goes to how much holding the check is worth, not whether it has any value at all. Some additional value is created by the bad check statute and other legal provisions governing instruments.

This is not to say that by putting up a check as collateral, a lender like Cash Store necessarily takes a security interest in the amount printed on the face of the instrument. Rather, the rights created by state commercial law can, and in this case do, create some value in the instrument. We are therefore satisfied that Cash Store could lawfully assert under TILA that Smith's post-dated check was security for the loan.

Conclusion

For the reasons stated above, we AFFIRM the district court's dismissal of the security interest claim, and we REVERSE and REMAND the district court's dismissal of the receipt claim for further proceedings consistent with this opinion.

/1 The Federal Reserve Board's Official Staff Commentary to Regulation Z does, however, state that a lender is permitted to err on the side of inclusion in some circumstances: "If the creditor is unsure whether a particular interest is a security interest under applicable law (for example, if statutes and case law are either silent or inconclusive on the issue), the creditor may at its option consider such interests as security interests for Truth in Lending purposes." 12 C.F.R. Pt. 226, Supp. I, sec. 226.2(a)(25)(1). We need not resolve whether these circumstances apply to this dispute.

MANION, Circuit Judge, concurring in part and dissenting in part. I certainly agree with the court regarding the security issue. The Cash Store did not violate the Truth in Lending Act by informing Smith that it was holding her post-dated check as security for her loan. While possessing a post-dated check does not create a "security interest" as that term is usually understood, possession of the check nevertheless provided the Cash Store with added security for the loan. Although the Cash Store was not obligated under TILA to inform Smith that it held this check as security, lenders that seek to provide more information than is necessary under TILA should not be penalized for following the spirit of the statute. Thus, this court correctly affirmed the district court on

this, the most substantive issue before this court on appeal.

The court's decision to reverse the district court on Smith's "receipt" claim is a concern. It is important to note that there are two facets to this claim. Smith asserts that stapling a small receipt to "the top of the 'Consumer Loan Agreement' " violated TILA by (1) contradicting the TILA-mandated disclosures; and (2) obscuring the required disclosures. Complaint para. 19. Smith possibly stated a claim regarding the "obfuscation" assertion because there could be a fact question as to exactly where the receipt was stapled and what it specifically obscured. But on its face the receipt clearly does not "contradict" the finance charge and the annual percentage rate, and it should cause no confusion regarding the terms of the agreement itself.

With respect to Smith's contention that the receipt obscured the required disclosures, for starters it appears that no court has ever held that obstructing a borrower's immediate view of the TILA disclosures violates TILA. The text of the statute and the regulations interpreting the statute do not indicate that this constitutes a violation. This is literally a matter of first impression, on a claim that is weak at best. For that reason alone the district court's dismissal of this claim has merit. See 15 U.S.C. sec. 1638; 12 C.F.R. sec. 226.17(a)(1) & n.37 ("The disclosures may include an acknowledgment of receipt. . . . "). That aside, the documents attached to Smith's complaint include an 8½ x 11 inch disclosure form and a 4½ x 3 inch receipt that supposedly obstructed some of the mandated disclosures. Perhaps there is a plausible set of facts regarding the obstruction

claim that could require looking beyond the complaint to determine if Smith would be entitled to any relief. The complaint states that the receipt was stapled to the "top" of the agreement. The court's opinion refers to stapling to the "upper left-hand corner." The district court noted that the staple mark was on the upper left-hand corner of the receipt and the loan document itself had no marks. If "top" could mean "front" and if Smith could show that the receipt was consistently stapled in the middle of the page covering the boxes boldly labeled "Annual Percentage Rate" and "Finance Charge," perhaps she would have a claim. But if this relatively small receipt is routinely stapled to the upper left-hand corner with the lowest part barely covering one of the boxes and which could easily be lifted, there would not be any material obscuring of the TILA disclosures./1 More importantly, even assuming that an unsophisticated borrower would not lift up the receipt to see the small portion of the loan agreement covered by the receipt, such a borrower would still be able to clearly see the portions of the loan agreement which specify the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, the security posted for the loan, the penalty for late payment, and a notice telling the borrower to examine the other side of the agreement for important information. Congress enacted TILA to ensure that consumers had access to this information so that they could comparatively shop for loans. *See Walker v. Wallace Auto Sales, Inc.*, 155 F.3d 927, 930 (7th Cir. 1998) (citing *Brown v. Marquette Sav. & Loan Ass'n*, 686 F.2d 608, 612 (7th Cir. 1982) (Congress enacted TILA to "provide information to facilitate comparative credit shopping and

thereby the informed use of credit by consumers.")). So by clearly communicating these terms, the Cash Store complied with the Act. The two pieces of information that the receipt would obstruct (if stapled to the upper left-hand corner), the lender's name and the borrower's own name, are not material to comparing interest rates and the like (and the names were printed on the receipt anyway). Accordingly, unless the Cash Store attached the small receipt to the middle of the loan agreement, implicitly to purposely obstruct and prevent an easy review of this information, there is no violation of TILA's requirements that the mandated disclosures be clear and conspicuous, and plaintiff fails to state a claim under the Act.

Smith also contends that the contents of the receipt contradicted the TILA-mandated disclosures. An obvious contradiction of a material term would constitute a violation of TILA. *See Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1146 (11th Cir. 1994). Thus, when a lender informs a borrower of his right to rescind, but also contradicts this notice by telling the borrower that he had waived his right to rescind, the borrower may state a claim under the Act. Id. But Smith has not made such an assertion here. In assessing a complaint under Rule 12(b)(6) we again look at the exhibits attached to the complaint, and the receipts attached to Smith's complaint on their face do not contradict the disclosures in the loan agreement. The receipts here contain the amount borrowed on the same line as the words or word fragments: "DEFERRED CHECKS" or "DEFERRED DEPOSIT EXTENSI." As there are no assertions made in the receipt, these words in no way contradict the information contained in the loan agreement. Furthermore, as the district court stated:

> The receipt is an insignificant and unofficial-looking document in comparison with the attached loan document. The "deferred deposit check fee" is a single, small entry on the receipt. The loan agreement, on the other hand, disclosed the finance charge and interest rate in large, boldface type in a conspicuous position on the front of the loan document. Even an unsophisticated borrower, receiving the two documents together, could not be confused as to the terms of the loan.

Perhaps the 500% interest rate is an "unconscionable" exploitation of the needs of the unsophisticated consumer as Smith's claim under state law asserts. As with the purchase of lottery tickets or cigarettes, consumers of payday loans likely know a bad deal when they see it but ignore the risks and take the loan anyway. A new state or federal law could eliminate these loans regardless of market demand. Until then TILA should not be stretched beyond its terms to restrict a product sophisticated consumers don't like. Because Smith's complaint and the exhibits attached thereto indicate that there was no contradiction (much less an obvious contradiction of a material term), she has failed to state a claim under TILA. Accordingly, the district court also correctly dismissed this part of the claim under Rule 12(b)(6).

/1 Although Smith alleges that the receipt obstructed the disclosures, the size of the exhibits indicates otherwise. Where exhibits contradict the allegations in a complaint to which they are attached, the exhibits trump the allegations. *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 454 (7th Cir. 1998). This allows

courts to avoid unnecessary proceedings when an undisputed fact establishes that the plaintiff cannot satisfy the 12(b)(6) standard. *See General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997).

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VALERIE D. SMITH v. THE CASH STORE MANAGEMENT, INC. ET AL.

No. 99 C 1726

February 17, 2000, Decided

ORDER

Valerie Smith ("Smith") sues The Cash Store, Ltd., The Cash Store Management, Inc., and The Cash Store Management, Inc.'s officers and directors (collectively, "Cash Store") on behalf of a putative class for violations of the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* (TILA) (Count I and II), for relief from an unconscionable loan contract (Count III), and for violations of the Illinois Consumer Fraud Act (Count IV). Cash Store moves to dismiss the complaint pursuant to Fed. R. Civ. 12(b)(1) & (6).

For purposes of a motion to dismiss, the court accepts all well-pleaded allegations as true. *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1428 (7th Cir. 1996). Cash Store specializes in making short-term, high interest "payday" loans. Am. Compl. at 9, 10. The loans are typically in two weeks in duration and carry annual percentage rates greater than 500%. *Id.* at 10. At the end of the two week term, the borrower has the option of continuing the loan for an additional term by paying only the interest. *Id.*

Smith's amended complaint contends Cash Store's loan practices violated TILA and its implementing regulations for two reasons. First, she contends Cash Store violated TILA § 1632(a)'s requirement that a creditor disclose the finance charge and annual percentage rate clearly and more conspicuously than other disclosures. According to Smith, Cash Store stapled a receipt to the top of loan documents in such a way to obscure the required disclosures on the documents. Smith also contends Cash Store ambiguously described the finance charge as a "deferred deposit extension fee" or "deferred deposit check fee" on the receipt. The court refers to these claims as the "finance charge claims." Next, Smith contends Cash Store violated 12 C.F.R. § 226.18's requirement of accurate disclosure of any security interest. Smith argues the loan documents stated that the borrower's post-dated check serves as security for the loan, but that a post-dated check does not create a security interest under Illinois law ("the security interest claim").

On June 1, 1999, the court dismissed the amended complaint. The court found Smith's finance charge claims lacked merit because Smith could simply lift the receipt to read the disclosures, and that Smith could not have reasonably been confused by the disclosures. The court found Smith's security interest claim lacked merit because a check could serve as security under Illinois law. Having dismissed the TILA claims, the court dismissed the remaining state law claims for lack of jurisdiction. On appeal, the Seventh Circuit affirmed the dismissal of the security interest claim, reversed the dismissal of the finance charge claims, and remanded those to this court.

Smith v. Cash Store Management, Inc., 195 F.3d 325 (7th Cir. 1999). This court then reinstated Smith's state law claims.

The only claims presently before the court are Smith's finance charge claims under § 1632(a) and her state law claims. However, Smith seeks only statutory damages for her claims under § 1632(a). She does not seek actual damages. The Seventh Circuit has recently held that TILA does not permit recovery of statutory damages for violations of § 1632(a). *Brown v. Payday Check Advance, Inc.*, ___ F.3d ___, Nos. 99-3110, 99-3353, 99-3625, 2000 WL 122437 (7th Cir. Feb. 2, 2000). Therefore, Smith's finance charge claims under TILA must be dismissed, and her state law claims must be dismissed for lack of jurisdiction.

/S/ Suzanne B. Conlon

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

MARCH 7, 2000

BEFORE

Hon. William J. Bauer, Circuit Judge

Hon. Frank H. Easterbrook, Circuit Judge

Hon. Michael S. Kanne, Circuit Judge

SANDRA BROWN, DEBORAH JACKSON, and VICTORIA DAVIS, *Plaintiffs-Appellants,* No. 99-3110 v. PAYDAY CHECK ADVANCE, INC., and PAYDAY CHECK ADVANCE, LLC, both doing Business as Payday Express, *Defendants-Appellees.*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 C 2074 James B. Zagel, *Judge.*
MARGUERITE MITCHUM *Plaintiff-Appellant,* No. 99-3353 v. PAYDAY CHECK ADVANCE, INC., doing business as Payday Express, *Defendant-Appellee.*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 C 1869 Matthew F. Kennelly, *Judge.*

DENISE LAWS, *Plaintiff-Appellant,* No. 99-3625 v. PAYDAY LOAN CORP. OF ILLINOIS, *Defendant-Appellee.*	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 5562 Joan B. Gotschall, *Judge.*

Nos. 99-3110, 99-3353 & 99-3625

Order

Plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc on February 16, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH DISTRICT
CHICAGO, ILLINOIS 60604

March 7, 2000

Before

William J. Bauer, Circuit Judge

Frank H. Easterbrook, Circuit Judge

Michael S. Kanne, Circuit Judge

David Shabas, *Plaintiff-Appellant,* No. 99-4004 v. Lighthouse Financial Group of Illinois, Inc., *et al.*, *Defendants-Appellees*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 C 4501 James F. Holderman, *Judge.*

Order

Plaintiff-appellant filed a petition for rehearing and petition for rehearing en banc on February 16, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX N

15 U.S.C. § 1632. Form of disclosure; additional information

(a) Information clearly and conspicuously disclosed; "annual percentage rate" and "finance charge"; order of disclosures and use of different terminology

Information required by this subchapter shall be disclosed clearly and conspicuously, in accordance with regulations of the Board. The terms "annual percentage rate" and "finance charge" shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor. Except as provided in subsection (c) of this section, regulations of the Board need not require that disclosures pursuant to this subchapter be made in the order set forth in this subchapter and, except as otherwise provided, may permit the use of terminology different from that employed in this subchapter if it conveys substantially the same meaning.

* * *

15 U.S.C. § 1638. Transactions other than under an open end credit plan

* * *

(b) Form and timing of disclosures; residential mortgage transaction requirements

(1) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section,

all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

* * *

15 U.S.C. § 1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000;

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6),

(7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

APPENDIX O

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate. %	**FINANCE CHARGE** The dollar amount the credit will cost you. $	Amount Financed The amount of credit provided to you or on your behalf $	Total of Payments The amount you will have paid after you have made all payments as scheduled. $

You have the right to receive at this time an itemization of the Amount Financed.
☐ I want an itemization ☐ I do not want an itemization.

Your payment schedule will be:

Number of Payments	Amount of Payments	When Payments Are Due

Insurance
Credit life insurance and credit disability insurance are not required to obtain credit, and will not be provided unless you sign and agree to pay the additional cost.

Type	Premium	Signature	
Credit Life		I want credit life insurance.	_____ Signature
Credit Disability		I want credit disability insurance.	_____ Signature
Credit Life and Disability		I want credit life and disability insurance.	_____ Signature

You may obtain property insurance from anyone you want that is acceptable to (creditor).
If you get the insurance from (creditor). you will pay $_____.

Security: You are giving a security interest in:
☐ the goods or property being purchased.
☐ (brief description of other property)

Filing fees $_____ Non-filing insurance $_____

Late Charge: If a payment is late, you will be charged $_____ / _____ % of the payment.

Prepayment: If you pay off early, you
☐ may ☐ will not have to pay a penalty.
☐ may ☐ will not be entitled to a refund of part of the finance charge.

See your contract documents for any additional information about nonpayment, default, any required payment in full before the scheduled date, and prepayment refunds and penalties.
* means an estimate

Supreme Court, U.S.
FILED
AUG - 4 2000
CLERK

(2)

No. 99-1951

IN THE

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PAYDAY CHECK ADVANCE, INC.

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STATEMENT PURSUANT TO RULE 29.6

Payday Check Advance, Inc. ("Payday") is an Illinois corporation incorporated on April 18, 1997 and adopted the assumed name of Payday Express on July 7, 1997. Payday is a subsidiary of SHC Corp., an Illinois corporation. SHC Corp. owns 80% of Payday, and either Argent Holdings, Inc. or Argent Enterprises, Inc. owns 20% of Payday (the owner of the 20% interest is in dispute).

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REASONS FOR DENYING THE WRIT

Petitioners have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. They cannot contend that the decisions in the Seventh Circuit have created a split of authority on the issue presented. Rather, Petitioners attempt to invoke this Court's authority by asking it to correct errors supposedly committed in the district courts and the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"), and to address a question about the plain reading of certain Truth in Lending Act provisions dealing with the right to receive statutory damages. For the reasons explained herein, the Seventh Circuit opinions were proper in all respects. Accordingly, Respondent Payday Check Advance, Inc. respectfully urges the Court to deny the Petition for *Writ of Certiorari* because the Petitioners have not demonstrated a compelling reason to do otherwise.

Petitioners have repeatedly addressed the statutory damages issue before a number of federal district court judges and the Seventh Circuit. The position advanced by Petitioners before these judges and the Seventh Circuit was rejected for the reasons concisely stated in the opinions found in the Petition's Appendices. There is nothing new or novel raised by the Petitioners in their Petition and, despite Petitioners' assertion to the contrary, there are no opinions conflicting with the cases decided by the Seventh Circuit. Finally, the analysis and reasoning applied by the Seventh Circuit to the pending claims do not conflict with, abrogate, or weaken the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"). Accordingly, the opinions of the Seventh Circuit reflect the intended application of TILA to Petitioners' claim for statutory damages and should remain undisturbed.

I.

THE SEVENTH CIRCUIT'S OPINIONS APPROPRIATELY ADDRESS PETITIONERS' CLAIMS FOR STATUTORY DAMAGES UNDER TILA AND DO NOT CONFLICT WITH TILA.

In their respective complaints, Petitioners assert that Payday's TILA disclosures were not "conspicuously segregated" from all other terms, that the term "total of payments" was not included (instead the term "total of payment" was used), and that descriptive explanation of the disclosed terms were not provided.

The alleged violations of TILA raised by Petitioners in *Brown v. Payday Check Advance, Inc.* and *Mitchem v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000) were determined to be transgressions of TILA section 1632(a) ("more conspicuous"), section 1638(b)(1) ("conspicuously segregated"), and section 1638(a)(8) ("descriptive explanations"). Petitioners made no claim for any actual damages for these alleged violations, but instead sought only the recovery of statutory damages and attorneys fees. Damages recoverable under TILA are governed by 15 U.S.C. § 1640. The recovery of statutory damages under section 1640(a) is expressly limited by the contents of an unnumbered paragraph following section 1640(a)(4), which states:

> *In connection with the disclosures referred to in section 1638 of this title*, a creditor shall have liability determined under paragraph (2) *only* for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of "amount financed"),

> (3), (4), (5), (6) or (9) of section 1638(a) of this title . . .

15 U.S.C. § 1640(a) (emphasis added).

The Seventh Circuit, in reviewing the entirety of section 1640(a) vis-à-vis Petitioners' entitlement to a claim for statutory damages, correctly observed that section 1640(a), as drafted, permitted statutory damages *only* for failing to comply with the requirements of the enumerated sections, and not for other transgressions. None of Petitioners' alleged TILA violations fall within the enumerated sections:

- Failure to emphasize the typeface of "finance charge" and "annual percentage rate" — section 1632(a);

- Omission of descriptive explanations — section 1638(a)(8); and

- Appearance of extra matter in the federal box — section 1638(b)(1).

Brown, 202 F.3d at 989, 990.

The Seventh Circuit concluded that violations of these enumerated sections would not permit recovery under section 1640(a), since section 1640(a) specifically excludes these violations from claims for statutory damages. The damage limiting paragraph of section 1640(a) states that "[i]n connection with the disclosures referred to in section 1638 of this title", statutory damages shall be awarded "only for failing to comply with" the specifically enumerated provisions of sections 1635 and 1638. The "conspicuously segregated" requirement of 1638(b)(1) is a provision "in

connection with the disclosures referred to in section 1638". Section 1638(b)(1) is not listed as a provision permitting recovery of statutory damages under section 1640(a). The same analysis is applicable with respect to "descriptive explanations" of section 1638(a)(8) which, likewise, is not listed as a provision permitting recovery of statutory damages under section 1640(a). Finally, because all of the formal details prescribed by section 1632 are "in connection with" disclosures under 1638, omission from the list means no statutory damages. *Brown*, 202 F.3d at 992.

The plain reading of section 1640(a) remains unchallenged by Petitioners, who instead offer a "back door" argument under section 1638(a)(3) and section 1638(a)(4). This argument was completely rejected by the Seventh Circuit as an effort to rewrite section 1640(a) into a section of "universal inclusion", when Congress plainly intended to include some and exclude other violations from claims for statutory damages. *Brown*, 202 F.3d at 991. As the Seventh Circuit noted, if Congress had intended to permit plaintiffs to recover statutory damages for violations of section 1632(a), it could have so specified; and, because the "more conspicuously" disclosure provision in section 1632(a) was added at the same time as the provision in section 1640(a) limiting statutory damages, it is unlikely that the failure to include section 1632(a) violations was an oversight.

Petitioners have also urged that the disclosure requirements of Federal Reserve Board Regulation Z, 12 C.F.R. part 226 ("Regulation Z") are incorporated into the "more conspicuously" requirements of section 1638(a)(3) and section 1638(a)(4) and, therefore, statutory damages are available for these violations. However, the district courts and the Seventh Circuit have also rejected this argument since

the 1980 TILA amendments made the Regulation Z "more conspicuously" requirement part of TILA at section 1632(a). At the same time, Congress declined to include section 1632(a) violations in those sections for which statutory damages would be recoverable.

The Seventh Circuit went on to note in *Brown* that the considered portion of section 1640(a) was added to TILA by Congress in 1980 to curtail awards for "picky and inconsequential formal errors". *Brown*, 202 F.3d at 991. Nothing suggested by Petitioners changes the fact that the claimed violations were not significant and thus fall outside the provisions of section 1640(a) permitting recovery of statutory damages.

Petitioners' citation to *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999) offers scant support to their position because the court engaged in a legislative analysis that was neither well-founded nor logically consistent with the plain language of section 1640(a). For example, the court relied on pre-1980 TILA amendment cases to support an analysis that statutory damages under section 1640(a) are available for even "minute deviations from the requirements of TILA . . .". *Johnson*, 82 F. Supp. 2d at 275. With this flawed premise, the district court, in *Johnson*, completely departed from the language and intent of section 1640(a) when it ignored the fact that the disclosures in issue were section 1638 disclosures, outside of the enumerated section 1638 provisions which permit recovery of statutory damages. Finally, the court justified its departure from a plain reading of section 1640(a) by reasoning that since section 1632(a) precedes section 1638, Congress intended violations of 1632(a) to be treated as violations of section 1638(a)(3) and 1638(a)(4). *Johnson*, 82 F. Supp. 2d at 276. This,

however, is not how section 1640(a) reads, nor was the court's presumption well-founded. *See Brown*, 202 F.3d at 991, 992.

II.

PETITIONERS MISAPPLY THE HOLDINGS IN CASES CITED IN THEIR PETITION IN ORDER TO BOLSTER THEIR DESIRED INTERPRETATION OF SECTION 1640(a).

Petitioners have cited two cases in their Petition which they contend support their right to statutory damages for the subject TILA violations. In *Dixey v. Idaho First National Bank*, 677 F.2d 749 (9th Cir. 1982), where Petitioners assert that the court "awarded statutory damages or upheld claims for violations of the 'more conspicuousness' requirement" (Petition at 22), was a case decided before the 1980 TILA amendments. The court, in that case, observed that under the TILA amendments suits to impose penalties for minor violations may no longer arise. *Id.* at 753. In *Herrera v. First Northern Savings & Loan Association*, 805 F.2d 896 (10th Cir. 1986), the court never addressed section 1640(a), but instead focused on section 1640(c) which was the provision raised by defendant in seeking to avoid liability.

Finally, in *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), cited by Petitioners for the proposition that the failure to make TILA disclosures subjects a lender to statutory damages, has nothing whatsoever to do with the specific issue decided by the Seventh Circuit in this case. Instead, *Beach* is a rescission case addressing when the right to rescind is extinguished. Moreover, in *Beach*, plaintiffs asserted violations of sections 1638(a)(3) and 1638(a)(4), both of

which permit recovery of statutory damages. *Beach* is instructive in that this Court, in rejecting an expansive statutory reading of TILA by plaintiffs, noted that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion". *Beach* at 418. So, too, is the case here where under section 1640(a) certain violations were remediable by the right to statutory damages and others not. This analysis was correctly made by the district court and the Seventh Circuit.

III.

THE SEVENTH CIRCUIT'S OPINIONS DO NOT CONFLICT WITH ANY OTHER FEDERAL CIRCUIT COURT OPINIONS.

The Petitioners' statement that there is a conflict between the Seventh Circuit and Tenth Circuit concerning the recovery for statutory damages under section 1640(a) for violations of section 1632(a) is unsupportable. The Petitioners advanced the same argument before the Seventh Circuit, adding that *Dixey v. Idaho First National Bank*, 677 F.2d 749 (9th Cir. 1982) was likewise in conflict with *Brown v. Payday* — a position now abandoned. The Seventh Circuit correctly noted that the case in alleged conflict, *Herrera v. First Northern Savings & Loan Association*, 805 F.2d 896 (10th Cir. 1986), did not discuss the effect of section 1640(a), but instead dealt with the impact of section 1640(c), which avoids all liability where the complained of acts are not intentional or result from a bona fide error. *Herrera* at 900. Therefore, there are no conflicting court opinions which would compel that this Court review the opinions of the Seventh Circuit.

Finally, Petitioners argue that there was something unfair about the Seventh Circuit's decisions, and that these decisions may impact future claims for statutory damages and attorneys fees. These arguments are not well-grounded and do not amount to statements of "compelling reasons" that are a prerequisite for issuance of a *writ of certiorari*. *See* S. Ct. Rule 10. The Seventh Circuit's well-reasoned opinion in *Brown* pointed out that Congress enacted the TILA amendments in 1980 to curtail damages for picky and inconsequential formal errors, and that "[i]t would hardly be appropriate to undo Congress' decision by reading matters of form into the substantive provisions for which statutory damages are not authorized." *Brown* at 991.

CONCLUSION

For all the foregoing reasons, Respondent Payday Check Advance, Inc. respectfully requests that this Court deny the Petition for *Writ of Certiorari*.

Respectfully submitted,

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(3)

No. 99-1951

IN THE

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS THE CASH STORE MANAGEMENT, INC., THE CASH STORE, LTD., HAROLD L. AHLBERG AND TREVOR L. AHLBERG

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QUESTION PRESENTED FOR REVIEW

Whether under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, statutory damages are available under 15 U.S.C. § 1640(a) for an alleged technical violation of 15 U.S.C. § 1632(a)'s requirement that the "finance charge" be disclosed "more conspicuously" than other loan terms.

STATEMENT PURSUANT TO RULE 29.6

Respondent The Cash Store Management, Inc., now known as "Cottonwood Financial Management, Inc.," is the sole general partner of Respondent The Cash Store, Ltd., now known as "Cottonwood Financial Ltd." Cottonwood Financial Management, Inc. has no parent, and no publicly held company owns 10% or more of its stock. For ease of reference, the Cottonwood entities will be referred to herein by their former names.

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S. Rep. 96-368, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 236 ..... 9, 10

STATUTORY PROVISIONS

The following sets forth the statutory provisions relevant to Petitioner's claim against The Cash Store Respondents:

15 U.S.C. § 1632. Form of disclosure; additional information

(a) Information clearly and conspicuously disclosed; "annual percentage rate" and "finance charge"; order of disclosures and use of different terminology

* * *

. . . The terms "annual percentage rate" and "finance charge" shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor.

15 U.S.C. § 1638. Transactions other than under an open end credit plan

(a) Required disclosures by creditor

For each consumer credit transaction other than under an open end credit plan, the creditor shall disclose each of the following items, to the extent applicable:

* * *

(3) The "finance charge", not itemized, using that term.

15 U.S.C. § 1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of —

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . . .

* * *

In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of . . . paragraph . . . (3) . . . of section 1638(a) of this title . . . .

COUNTERSTATEMENT OF THE CASE

Petitioners' consolidated Statement of the Case does not attempt to set forth the facts alleged by one of the Petitioners, Valerie D. Smith, against one group of Respondents, The Cash Store Management, Inc., The Cash Store, Ltd., Harold L. Ahlberg, and Trevor L. Ahlberg (the "Cash Store Respondents"). Instead, the Statement of the Case groups together all of Respondents by erroneously claiming that each of the cases is "similar." Pet. at 4 n.1. Because the allegations by Ms. Smith against the Cash Store Respondents are factually distinct and vividly demonstrate the weakness of her claims, the Cash Store Respondents offer the following as a correct statement of the case against them.

Between June 13, 1998 and September 19, 1998, Ms. Smith obtained eight loans from The Cash Store Ltd. ("The Cash Store"), and on each occasion she signed The Cash Store's standard Consumer Loan Agreement. App. J to Pet. at J2. Significantly, as the district court held, the Consumer Loan Agreements accurately disclosed the "ANNUAL PERCENTAGE RATE," the "FINANCE CHARGE," the "AMOUNT FINANCED," and the "TOTAL OF PAYMENTS" to Ms. Smith in the manner required by the provisions of TILA. App. I to Pet. at I4.[1]

---

1. Petitioner's reproduction of the district court's June 1, 1999 Memorandum Opinion and Order in Appendix I to the Petition contains a typographical error. Specifically, page I4 contains a sentence reading "There is *not* dispute that the disclosures on the loan documents themselves satisfy TILA." (emphasis added.) The actual opinion issued by the district court reads as follows: "There is no dispute that the disclosures on the loan documents themselves satisfy TILA."

Ms. Smith's Amended Complaint nonetheless alleged two violations of TILA and related state law claims against the Cash Store Respondents.[2] The Petition for Writ of Certiorari, however, seeks review of only one TILA claim — Ms. Smith's claim that The Cash Store violated 15 U.S.C. § 1632(a) when it provided her with a 3" x 4" cash register receipt at the end of each transaction, along with her copy of the 8½" x 11" Consumer Loan Agreement (hereinafter the "Receipt Claim"). According to Ms. Smith, these small cash register receipts violated 15 U.S.C. § 1632(a)'s requirement that the "finance charge" be disclosed "more conspicuously" than other terms because they obfuscated the disclosures on the various loan agreements. Ms. Smith alleged no actual damages in connection with her Receipt Claim and instead sought only statutory damages and attorneys' fees under 15 U.S.C. § 1640(a).

The district court, relying on *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000), held that statutory damages are not available for a violation of Section 1632(a)'s "more conspicuous" requirement and dismissed the Receipt Claim because Ms. Smith did not allege any actual damages. App. K to Pet. The Court of Appeals for the Seventh Circuit affirmed the dismissal of the Receipt Claim on April 18, 2000. App. C to Pet.

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2. On October 27, 1999, the Court of Appeals for the Seventh Circuit affirmed the dismissal of Petitioner's TILA claim that The Cash Store improperly disclosed the existence of a security interest in its Consumer Loan Agreements. *See Smith v. The Cash Store Mgmt., Inc.*, 195 F.3d 325 (7th Cir. 1999); App. J to Pet. On remand, the district court dismissed Petitioner's state law claims, pursuant to 28 U.S.C § 1367(c)(3), when it dismissed the TILA claim that forms the basis for the Petition. App. K to Pet. at K3.

REASONS FOR DENYING THE WRIT

I. THE *BROWN* DECISION CORRECTLY APPLIES THE PLAIN LANGUAGE OF 15 U.S.C. § 1640.

It is well settled that a statute's plain language should be enforced according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Because the Seventh Circuit's decision in *Brown* applies the plain language of Section 1640(a), the writ should be denied.

As the Seventh Circuit held, the first sentence in Section 1640(a) indicates that there are several exceptions to the general rule that a creditor may be liable for statutory damages in the event of a TILA violation. *Brown*, 202 F.3d at 990-91; App. A to Pet. at A5-A6. The exception that is fatal to Ms. Smith's claim for statutory damages is found in the penultimate sentence of Section 1640(a), which provides that "*[i]n connection with the disclosures referred to in section 1638* of this title, a creditor shall have a liability [for statutory damages] *only* for failing to comply with the requirements of . . . paragraph . . . (3) . . . of section 1638(a) of this title . . . ." 15 U.S.C. § 1640(a) (emphasis added). As the Seventh Circuit also held, the use of the word "only" in Section 1640(a) confines the violations for which statutory damages are available to a closed list. *Brown*, 202 F.3d at 991; App. A to Pet. at A6. In other words, statutory damages are available "only" for violations of the subsections enumerated in Section 1640(a). In this case, the only applicable subsection is Section 1638(a)(3), which requires that a creditor accurately disclose the finance charge.

It is undisputed, however, that The Cash Store did not violate Section 1638(a)(3) because the finance charge *was*

accurately disclosed to Ms. Smith in each of her Loan Agreements. App. I to Pet. at I4. Moreover, Section 1632(a)'s requirement that the finance charge be disclosed "more conspicuously than other terms" is a requirement that is "in connection with the disclosures referred to" in section 1638(a)(3) because the form of that disclosure (*i.e.*, that the finance charge be more conspicuous) is necessarily "in connection with" Section 1638(a)(3)'s requirement that the finance charge be disclosed in the first place. *See Brown*, 202 F.3d at 991; App. A to Pet. at A6 (holding that "[t]he more-conspicuous-disclosure obligation of § 1632(a) works '[i]n connection with the disclosures referred to in section 1638' "). Therefore, because the "more conspicuous" requirement of Section 1632(a) is connected with the disclosure referred to in Section 1638, but Section 1632(a) is not included in Section 1640(a)'s list of violations eligible for statutory damages, Ms. Smith's Receipt Claim was properly dismissed.

II. THE *BROWN* DECISION IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF 15 U.S.C. § 1640.

Although Petitioner correctly concedes that TILA was amended in 1980 to prohibit the recovery of statutory damages under Section 1640 based on purely "technical" violations of the Act, she nonetheless attempts to twist the available legislative history concerning the 1980 amendments to support her Receipt Claim for statutory damages. Although resort to the legislative history would be improper given the unambiguous language of Section 1640(a), that history actually supports the *Brown* holding that statutory damages are limited to significant violations and are not available for violations of

Section 1632(a).[3] *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("the starting point for interpreting a statute is the language of the statute itself" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive").

The Truth in Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, 94 Stat. 168, 175, 181 (1980) (the "1980 amendment"), became effective in April 1982 and changed TILA in two relevant respects. First, the 1980 amendment added to Section 1632(a) the requirement that the finance charge disclosure be "more conspicuous." Second, the 1980 amendment added the provisions limiting

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3. Petitioner's attempt to substitute her views of the legislative history and her beliefs as to what the law should be for the plain meaning of the statute was properly rejected by the Seventh Circuit. *See Brown*, 202 F.2d at 991-92; App. A to Pet. at A8 ("Whether Congress should have included [statutory damages for violations of Section 1632(a)], or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted."). The Seventh Circuit's holding comports with this Court's mandate that courts should assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). Indeed, members of this Court have warned against using legislative history to interpret unambiguous statutory language. *See, e.g., Holder v. Hall*, 512 U.S. 874, 933 (1994) (cautioning against reading legislative history "selectively to support the result the Court intends to achieve") (Thomas, J., concurring); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. . . . If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.") (Scalia, J., concurring in the judgment).

the availability of statutory damages to Section 1640(a). Contrary to Petitioner's assertions, however, the legislative history behind the 1980 amendments generally, and Section 1640(a) in particular, illustrates that Congress did *not* intend to allow statutory damages for technical violations such as her Receipt Claim. *See Brown*, 202 F.2d at 991; App. A to Pet. at A7 (the 1980 amendment to Section 1640(a) was added to "curtail damages awards for picky and inconsequential formal errors.")

For example, one Senate Report states that the rationale behind the amendments to Section 1640 was to "limit creditor civil liability for statutory penalties to only significant violations" as a means of protecting creditors from large statutory damage awards caused by "a steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions." *See* S. Rep. No. 96-73, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 280, 280-81. In another passage, the same Senate Report demonstrates that Congress intended to

> narrow a creditor's civil liability for statutory penalties to only those disclosures which are of central importance in understanding a credit transaction's cost or terms. It is anticipated that this will eliminate litigation which is based on violations of a purely technical nature.
>
> In a 'closed end' transaction . . . *the creditor's civil liability for statutory penalties would be limited to disclosure of* the amount financed, *the finance charge*, the total of payments, the annual percentage rate, the number, amount, and due dates of payments, any security interest taken, and

> where applicable, the consumer's right of recission. *This is a significant reduction from the current scope of liability.*

Id. at 285 (emphasis added); *see also* S. Rep. 96-368, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 236, 251-52 (TILA was amended in order to "limit creditor civil liability for statutory penalties to only significant violations" because, among other reasons, creditors "have encountered increasing difficulty in keeping current with a steady stream of . . . highly technical judicial decisions," and "many creditors have sincerely tried to comply with the act but, due to its increasing complexity and frequent changes, have nonetheless found themselves in violation and subject to litigation").

Thus, in contrast to the legislative statements outlining the general purposes of TILA cited by Petitioner, the legislative history associated specifically with the amendment to Section 1640 supports the *Brown* court's holding that statutory liability applies *only* when there is a complete failure to disclose the "finance charge" and that statutory damages are *not* available when, as in this case, the finance charge was disclosed, but that disclosure was allegedly not "more conspicuous" than other disclosures. Indeed, this case represents the very type of litigation "based on violations of a purely technical nature" that Congress intended to eliminate.[4]

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4. Petitioner dramatically overstates the impact of *Brown* when she claims that it "eviscerates TILA and invites blatant evasion of the disclosure requirements." Pet. at 13. In making this statement, Petitioner ignores the fact that creditors can still be held liable for statutory damages under Section 1640(a) if they commit material

(Cont'd)

III. THERE IS NO CONFLICT BETWEEN THE *BROWN* DECISION AND THE DECISIONS OF THIS COURT OR OTHER UNITED STATES COURTS OF APPEALS.

Petitioner misrepresents the case law when she claims that there is a conflict between the Seventh and Tenth Circuits on the issue of whether statutory damages are available under Section 1640(a) for violations of Section 1632(a). In attempting to manufacture such a conflict, Petitioner relies solely on *Herrera v. First Northern S&L Ass'n*, 805 F.2d 896 (10th Cir. 1986). Pet. at 26-27. As the Seventh Circuit

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(Cont'd)
TILA violations. Moreover, even a creditor who violates Section 1632(a) can be liable for any actual damages and subjected to administrative enforcement. *See* 15 U.S.C. §§ 1607, 1640(a)(1). Thus, the Seventh Circuit certainly did not give creditors free rein to violate TILA. Furthermore, when making this prediction of doom, Petitioner conveniently ignores the fact that the legislative history confirms that Congress intended that a borrower would be limited to a remedy of actual damages or pursuing administrative enforcement in a case alleging a technical violation:

> [The 1980 amendment] is intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping. The committee believes that this will eliminate litigation based on purely technical violations of the act. *Civil liability for actual damages and administrative liability would continue to attach to all of the act's requirements.*

See S. Rep. 96-368, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 236, 267 (emphasis added); S. Rep. 96-73, 96th Cong., 1st Sess. 1979, *reprinted in* 1980 U.S.C.C.A.N. 280, 294 (same).

recognized, however, the Tenth Circuit did not discuss the relevant portion of Section 1640(a) in its opinion and, as a result, it did not "hold anything one way or the other about it." *Brown*, 202 F.3d at 992; App. A to Pet. at A9. Instead, *Brown* represents the first time that the limitation on statutory damages contained in Section 1640(a) has been addressed by a Court of Appeals.

Petitioner also misrepresents the case law when she claims that her interpretation of Section 1640(a) is "reinforced by case law." Pet. at 22-23. In support of this assertion, Petitioner cites to *Beach v. Ocwen Federal Bank*, 523 U.S. 410 (1998), and *Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749 (9th Cir. 1982). Pet. at 22-23.

In *Beach*, however, this Court did not address the issue of when statutory damages were permitted under Section 1640(a), and instead held only that a right of recission defense may not be revived as a recoupment defense beyond the three-year expiration period. Before turning to the issue before it, the Court merely provided a broad overview of TILA in dicta when it stated:

> [T]he Act requires creditors to provide borrowers with clear and accurate disclosures of terms dealing with things like finance charges, annual percentage rates of interest, and the borrower's rights. See §§ 1631, 1632, 1635, 1638. Failure to satisfy the Act subjects a lender to criminal penalties for noncompliance, see § 1611, as well as to statutory and actual damages traceable to a lender's failure to make the requisite disclosures, see § 1640.

Beach, 523 U.S. at 412. Because *Beach* simply did not address the issue of whether statutory damages are available for a purported violation of Section 1632(a), Petitioner's attempt to transform the above-quoted passage into a holding supporting her position does not withstand scrutiny.

As the Seventh Circuit recognized, the Ninth Circuit's opinion in *Dixey* also does not support Petitioner's interpretation of Section 1640(a). *See Brown*, 202 F.3d at 992; App. A to Pet. at A8-A9. *Dixey* was decided by applying the pre-1980 amendment version of TILA, and the court did not carefully examine the effect of the 1980 amendments to Section 1632(a) or Section 1640(a). Indeed, the *Dixey* court specifically noted that the 1980 amendments eliminated penalties for "technical violations" and suggested that its holding might have been different under the post-1980 amendment of TILA. 677 F.2d at 753.

Finally, Petitioner cites to two district court opinions and a bankruptcy opinion which she claims support her position that she is entitled to statutory damages for a violation of Section 1632(a). None of these opinions, of course, creates a conflict among the Courts of Appeals. Moreover, these opinions are either incorrect statements of the law or do not address the issue presented in this case. For example, the first district court opinion, *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D. Del. 1999), was issued before the Seventh Circuit issued its opinion in *Brown*. Furthermore, rather than simply focusing on and applying the plain language of the statute, the *Johnson* court reached its conclusion by substituting its beliefs about Congress' intent when it enacted the 1980 amendment for the statutory text. *See* 82 F. Supp. 2d at 274, 276 (speculating that "it is highly doubtful that Congress would consider the failure to

follow the explicit requirements of the new law as a 'technical violation' " and concluding that merely because "Section 1632 precedes Section 1638, the court presumes that Congress intended a violation of Section 1632(a) to be treated as a violation of Section 1638(a)(3) and 1638(a)(4)"). Moreover, as demonstrated above, the *Johnson* court's beliefs as to Congress' intent when it enacted the 1980 amendment are actually contrary to the available legislative history. Therefore, the district court opinion in *Johnson* opinion does not create an issue worthy of writ consideration.

The other two lower court opinions that Petitioner claims stand for the proposition that courts "have required lenders to pay statutory damages" if they fail to comply with Section 1632(a), *Pendleton v. American Title Brokers, Inc.*, 754 F. Supp. 860 (S.D. Ala. 1991), and *In re Cook*, 76 B.R. 661 (Bankr. C.D. Ill. 1987), merit little discussion. Pet. at 12. As in *Herrera*, neither the *Pendelton* court nor the *Cook* court discussed Section 1632(a) or Section 1640(a)'s limitation on statutory damages. Therefore, those cases simply do not contain any holding bearing on the issue before this Court.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 99-1951

IN THE

Supreme Court of the United States

SANDRA BROWN, *et al.*,

Petitioners,

v.

PAYDAY CHECK ADVANCE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS LIGHTHOUSE FINANCIAL GROUP OF ILLINOIS, INC. AND ANDREW J. MAY

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Lighthouse Financial Group of Illinois, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners have submitted a Statement of the Case only for the appeals from *Brown, et al. v. Payday Check Advance, Inc., et al.* and *Laws v. Payday Loan Corp.*, claiming that "[t]he statement of the case of all of the cases [for which Petitions have been filed] are similar." (Petition at 4 n.1). Lighthouse Financial Group of Illinois, Inc. ("Lighthouse"), a financial institution specializing in short-term loans, and Andrew J. May ("May"), Lighthouse's President, are Respondents in the Petition filed by Petitioner David Shabas ("Shabas") in *Shabas v. Lighthouse Financial Group of Illinois, Inc., et al.* ("*Shabas*"). Lighthouse and May disagree with Petitioners' assertion that "all of the cases are similar." Petitioners' Statement of the Case contains numerous inaccuracies with respect to *Shabas*. Lighthouse and May provide an accurate Statement of the Case for *Shabas* below.

Shabas filed a Complaint in three counts in connection with a short-term loan he received from Defendant Lighthouse. In a loan disclosure form provided to Shabas, Lighthouse disclosed the cost of credit for the loan expressed as a monthly percentage rate, as well as an annual percentage rate. In Count I of the Complaint, Shabas alleged that by disclosing the cost of credit as a monthly percentage rate as conspicuously as the disclosure of the cost of credit as an annual percentage rate, Lighthouse and May violated the "conspicuous" disclosure requirements of Section 1638 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.* TILA requires that certain disclosures mandated by TILA be conspicuously segregated from disclosures not required by TILA and that the terms "finance charge" and "annual percentage rate" be disclosed more conspicuously than any other terms, except the identity of the creditor.

15 U.S.C. §§ 1638(b)(1), 1632(a). (Petition at N1-N2). In his Complaint, Shabas also made a vague claim that Lighthouse and May misled him in connection with the disclosure of a security interest in Shabas' vehicle. In Counts II and III of the Complaint, Shabas purported to state Illinois law causes of action for interest rate "unconscionability" and under Illinois' Consumer Fraud Act, based upon the district court's supplemental jurisdiction.

Lighthouse and May moved to dismiss Shabas' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). As to Count I, Lighthouse and May argued that Lighthouse complied with TILA, but even if Shabas could establish a technical violation of TILA's conspicuous disclosure requirements contained in TILA's Section 1638(b), Shabas' claim still failed due to an absence of recoverable damages. Shabas did not allege in his Complaint that he suffered any actual damages as a result of the alleged technical TILA violations, and, Lighthouse and May argued, Section 1640(a) of TILA prohibits a plaintiff from recovering statutory damages for alleged violations of TILA's conspicuous disclosure or segregation requirements. As to Counts II and III, Lighthouse and May argued that the court should decline to exercise its supplemental jurisdiction over Shabas' state law claims, which involved matters of state policy, namely, permissible interest rates on short-term loans.

The district court granted Lighthouse's and May's Motion to Dismiss. (Petition at G1-G7). The district court found that Lighthouse's disclosures to Shabas complied with TILA as a matter of law and were accurate. (Petition at G2-G4). Having dismissed Shabas' TILA claims, the district court declined to exercise supplemental jurisdiction over

Shabas' pendent state law claims, and it entered judgment in favor of Lighthouse and May and against Shabas. (Petition at G7).

Shabas moved for reconsideration of the district court's dismissal of his claims. The district court denied Shabas' motion for reconsideration. (Petition at H1-H3). While concluding upon reconsideration that it could not decide as a matter of law that Lighthouse's disclosures complied with TILA, the district court held that Shabas' claims should be dismissed, finding that Section 1640(a) of TILA does not allow a plaintiff to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements. (Petition at H2-H3). Contrary to Shabas' claim in the Petition (Petition at 15), the district court did not specifically focus on Section 1632(a) of TILA for the statute's conspicuous disclosure requirements, as Shabas did not specifically claim a violation of Section 1632(a) in his Complaint and did not even mention this provision of TILA before the district court until he filed his motion for reconsideration.

Shabas appealed the district court's judgment in favor of Lighthouse and May to the Court of Appeals for the Seventh Circuit. But before briefing had commenced on Shabas' appeal, the Court of Appeals decided *Brown, et al. v. Payday Check Advance, Inc., et al.*, 202 F.3d 987 (7th Cir. 2000) ("*Brown*"). (Petition at A1-A9). In *Brown*, the Court of Appeals held that TILA did not provide for recovery of statutory damages for alleged violations of the conspicuous disclosure requirements contained in Section 1638(b) of TILA. (Petition at A1-A9). The Court of Appeals had previously decided two other cases involving TILA, *Hahn v. McKenzie Check Advance of Illinois, LLC*, No. 99-3346, (7th Cir. Feb. 2, 2000), and *Smith v. Cash Store Management,*

Inc., 195 F.3d 325 (7th Cir. 1999). On the authority of these decisions, the Court of Appeals issued an Order affirming the district court's judgment in favor of Lighthouse and May and against Shabas. (Petition at B1).

Shabas petitioned the Court of Appeals for a rehearing and a rehearing *en banc*. The Court of Appeals issued an Order denying Shabas' petition.

REASONS FOR DENYING THE WRIT

There are several reasons to deny the Petition. First, the only federal question involved in this case, whether the plain language of TILA authorizes a plaintiff to recover statutory damages for certain limited technical violations of TILA, does not present an important question of federal law. Second, the Court of Appeals' holding that a plaintiff is not entitled to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements is consistent with both the plain text and legislative history of TILA. Finally, there is no conflict among the decisions of the Courts of Appeals, as the Seventh Circuit is the only Court of Appeals to have actually addressed the portion of Section 1640(a) of TILA at issue in this case.

I.

THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW.

This Court should deny the Petition because this case does not present an important question of federal law. The only federal question presented by this case is whether, under the plain language of TILA, a plaintiff who has not suffered

actual damages is entitled to recover statutory damages for certain alleged technical violations of the statute. This question does not involve an area of significant consumer concern under federal law.

First, this case does not present an issue involving any real harm to consumers. Shabas (apparently like all of the Petitioners) did not allege in his Complaint that he suffered any actual damages as the result of the alleged TILA violations by Lighthouse and May. To recover actual damages under TILA, Shabas had to plead and prove: 1) that he read the TILA disclosure statement; 2) that he understood the charges being disclosed; 3) that had the disclosure statement been accurate, he would have sought alternative financing; and 4) that he would have found, and been qualified to obtain, an alternative loan with better terms. *Adiel v. Chase Fed. Sav. & Loan Ass'n*, 630 F. Supp. 131, 133 (S.D. Fla. 1986), *aff'd*, 810 F.2d 1051 (11th Cir. 1987); *Romaker v. Crossland Mortgage*, 1996 WL 254299 at *2 (N.D. Ill., May 10, 1996) (Grady, J.). Shabas did not allege any of these elements in his Complaint. (Petition at 6).

Shabas' failure to allege in his Complaint that he suffered any actual damages as a result of the alleged TILA violations is not surprising given the technical nature of the alleged violations at issue in this case. Lighthouse provided a loan disclosure form to Shabas that was accurate in all respects. But according to Shabas, Lighthouse violated TILA because in addition to disclosing the finance charge and the cost of credit as an annual percentage rate, it disclosed the cost of credit as a monthly percentage rate, and it did so in a manner that made the disclosure of the monthly percentage rate as conspicuous as the disclosures of the finance charge and annual percentage rate.

The technical violation of TILA alleged by Shabas does not present a serious threat of harm to consumers. Shabas received a short-term loan from Lighthouse, with repayment of the principal due eight months from the date of funding of the loan. Shabas was required to pay interest on a monthly basis during the term of the loan and was entitled to pay off the loan early. For a customer obtaining a short-term loan issued by Lighthouse, the expression of the cost of the loan as a monthly percentage rate is relevant. Thus, to enable its customers to best understand the terms of a loan, Lighthouse disclosed the monthly percentage rate prominently in its loan disclosure forms. If in doing so Lighthouse committed a technical violation of TILA's conspicuous disclosure requirements, as Shabas alleged, the violation was harmless.

Although Shabas spends much of the Petition discussing the background and purpose of TILA (Petition at 8-12), Shabas does not and cannot argue that Congress intended for TILA to clog the federal courts with opportunistic lawsuits based on technical violations of the statute. Indeed, as the Seventh Circuit pointed out below (Petition at A7-A8), Congress acted to restrict the availability of statutory damages for certain technical violations of TILA when it amended Section 1640(a) of TILA in 1980. *See* S. Rep. No. 368, 96th Cong., 1st Sess. 17, reprinted in (1980) U.S. Code Cong. and Ad. News 236, 239.

As Shabas recognizes, TILA was intended to address serious affronts to consumer welfare. There is no serious threat of harm posed by type of disclosures made by Lighthouse to Shabas. Shabas' attempt to distract the Court with hypothetical disclosures that Shabas claims could result if plaintiffs are denied recovery of statutory damages for certain technical violations of TILA (Petition at 12-20) is

similarly unavailing. The only disclosures before the Court in *Shabas* are the disclosures made by Lighthouse. Those disclosures were accurate and were not misleading.

Second, to the extent that Shabas continues to challenge the lower court's refusal to exercise supplemental jurisdiction over his pendent state law claims, this case does not present an issue of federal law. "[T]he general rule is that, when all federal claims are dismissed before trial, [a] district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Kennedy v. Schoenberg, Fisher & Newman*, 140 F.3d 716, 727 (7th Cir.), *cert. denied*, 119 S. Ct. 167 (1998). That rule is fully applicable here, where interest rates for small loans are governed by an Illinois statute, the Illinois Consumer Installment Loan Act, 205 ILCS 670/1 *et seq.*, which contains no cap on interest rates and instead provides that a lender "may charge, contract for and receive thereon interest at a rate agreed upon by the licensee and the borrower . . ." 205 ILCS 670/15(a).

Moreover, the subject of short-term loans is currently being debated in the Illinois legislature, where several recently-introduced bills propose additional regulations to supplement the current Illinois regulatory framework under the Consumer Installment Loan Act and require the Illinois Department of Financial Institutions to perform a comprehensive study of the short-term loan industry. *See, e.g.*, Illinois House Bill No. 2189, Illinois Senate Bills Nos. 358, 446 and 842. To the extent that this case presents important consumer issues relating to the short-term loan industry, those issues are the subject of legislative action at the state level and do not involve an area of significant federal concern.

II.

THE LOWER COURTS' HOLDINGS ARE CONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF TILA.

The lower courts' holdings that Shabas is not entitled to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements were based on the plain language and legislative history of TILA. Because this case involves the lower courts' straightforward and correct application of principles of statutory interpretation and legislative history, this Court should deny the Petition.

In the sole Count of his Complaint that invoked federal law, Shabas claimed that Lighthouse and May violated the conspicuous disclosure requirements of Section 1638(b) of TILA. The lower courts based their decision that Shabas was not entitled to recover statutory damages for alleged violations of TILA's conspicuous disclosure requirements on the damages-limiting provision of Section 1640 of TILA. Although subsection 1640(a)(2) contains an "apparently liberal grant of statutory damages," this grant "is then limited by the contents of an unnumbered paragraph following subsection 1640(a)(4)." *Galloway v. Long Beach Mortgage*, 220 B.R. 236, 245 (E.D. Pa. 1998). This provision restricting the availability of statutory damages under TILA states in relevant part:

> In connection with the disclosures referred to in section 1638 of this title, *a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as*

> *it requires a disclosure of the 'amount financed'), (3), (4), (5), (6), or (9) of section 1638(a) of this title*, or for failing to comply with disclosure requirements under State law for any term which the [Federal Reserve] Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title.

15 U.S.C. § 1640(a) (emphasis supplied).

In *Brown*, the Seventh Circuit, applying this plain statutory language, ruled that where the plaintiffs alleged violations of TILA's Sections 1632(a), 1638(a)(8), and 1638(b), the damages-limiting provision in Section 1640(a) prevented the plaintiffs from recovering statutory damages under TILA. (Petition at A1-A9). The Seventh Circuit reasoned that Section 1632(a), which requires emphasis of the typeface of the terms "finance charge" and "annual percentage rate," works "in connection with" the conspicuous disclosure requirements of 1638(b), and thus comes within the ambit of the damages-limiting provision in Section 1640(a). (Petition at A4-A9). Because Sections 1632(a), 1638(a)(8), and 1638(b) do not appear on the list of violations eligible for statutory damages under Section 1640(a), the plaintiffs were not entitled to recover statutory damages. (Petition at A1-A9).

In addition to applying the plain language of TILA's Section 1640(a), the Seventh Circuit in *Brown* also looked to the legislative history of this provision. (Petition at A7-A9). The restriction on the availability of statutory damages contained in the unnumbered paragraph after

Section 1640(a)(4) was enacted by Congress as part of the Truth-In-Lending Simplification and Reform Act of 1980. Pub. L. No. 96-221, tit. VI, 94 Stat. 132, 168 (1980). The legislative history of this enactment revealed that Congress intended to restrict the availability of statutory damages for certain technical violations of TILA:

> This section is intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping. The committee believes this will eliminate litigation based on purely technical violations of the act. Civil liability for actual damages and administrative liability would continue to attach to all the act's requirements.
>
> In closed-end credit, a statutory penalty of $100 to $1,000 would attach only to rescission requirements and disclosure of the amount financed, finance charge, annual percentage rate, total of payments, number, amount, and due dates of payments, and the security interest statement. Thus, the creditor will not be subject to a statutory penalty for more technical requirements.

S. Rep. No. 368, 96th Cong., 1st Sess. 17, reprinted in (1980) U.S. Code Cong. and Ad. News 236, 267.

Shabas is incorrect in his assertion that denying recovery of statutory damages for alleged violations of TILA's conspicuous disclosure requirements renders Sections 1632(a) and 1638(b)(1) of TILA "superfluous." (Petition at 23). A plaintiff suing under TILA may still recover actual

damages suffered as a result of violations of TILA's conspicuous disclosure requirements. By allowing a plaintiff to recover actual damages but not statutory damages based on violations of these TILA requirements, Congress has focused the damages provisions of TILA on violations that actually cause consumers serious harm.

Based on the plain language of TILA's Section 1640(a), which does not include violations of TILA's conspicuous disclosure requirements among the violations for which a plaintiff may recover statutory damages, and TILA's legislative history, which reveals the intention of Congress to limit creditor liability for certain technical violations of TILA, the lower courts properly dismissed Shabas' TILA claims. The lower courts' straightforward application of the plain language and legislative history of TILA was correct, and there is no compelling reason for this Court to review the lower courts' dismissal of Shabas' TILA claims.

III.

THE COURTS OF APPEALS ARE NOT IN CONFLICT.

Contrary to Shabas' claims, the lower courts' holdings in the cases at issue in this Petition that a plaintiff is not entitled to recover statutory damages for violations of TILA's conspicuous disclosure requirements do not conflict with any other Court of Appeals decisions. The Seventh Circuit is the only Court of Appeals that has actually addressed the scope of the damages-limiting provision following Section 1640(a)(4) of TILA.

Shabas claims that the Seventh Circuit's decision in *Brown* conflicts with an opinion from the Court of Appeals for the Tenth Circuit, *Herrera v. First Northern S. & L. Ass'n*, 805 F.2d 896, 901 (10th Cir. 1986). (Petition at 26). There is no conflict between *Brown* and *Herrera*. In *Herrera*, the Tenth Circuit ruled that the "*bona fide* error" exception to statutory damages under Section 1640(c) of TILA did not apply under the facts at issue in that case, where the creditor failed to comply with TILA's conspicuous disclosure requirements. *Id.* at 899. The Tenth Circuit reasoned that the creditor's failure to comply with the conspicuous disclosure requirements was not a clerical, mathematical, printing, or computer error, which are the only types of errors excusable under the plain language of Section 1640(c). *Id.* at 900-01. No argument was raised by the defendant in *Herrera* that statutory damages were simply unavailable in connection with a violation of TILA's conspicuous disclosure requirements.

Herrera and *Brown* address different subsections of TILA. While *Herrera* addressed the "*bona fide* error" exception to statutory damages under Section 1640(c), *Brown* addressed the statutory damages-limiting provision for certain technical violations of TILA located at the unnumbered paragraph after Section 1640(a)(4). Thus, there is no conflict between these two cases. To the contrary, *Herrera* and *Brown* are in harmony with each other, as each applied the plain statutory language of TILA to reach a correct result.

Other than the *Herrera* case, Shabas does not contend that any decision of another Court of Appeals conflicts with the Seventh Circuit's holding in *Brown* or its reasoning with respect to the statutory damages limitation of Section 1640(a)

of TILA. The Courts of Appeals are not in conflict today. The Seventh Circuit is the only Court of Appeals to date that has addressed the damages-limiting provision in Section 1640(a) of TILA. The early stage of development of lower court decisions actually addressing the question of the scope of the damages limiting provisions of 1640(a) provides yet another reason to deny the Petition.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, Respondents Lighthouse Financial Group of Illinois, Inc. and Andrew J. May respectfully request that this Honorable Court deny the Petition filed by David Shabas.

Respectfully submitted,

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